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No. 12641

2656

United States
Court of Appeals
for the Ninth Circuit.

AUBREY L. CHARMAN, STANLEY CUM-
MINGS, JOHN A. HRUTKY and JOHN F.
SCHWELLA,

Appellants,

vs.

PAN AMERICAN AIRWAYS, INC., a Corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED

OCT 24 1950

PAUL P. O'BRIEN,

CLERK

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AUBREY L. CHARMAN, STANLEY CUM-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Defendants and Appellees.

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 383485

AUBREY L. CHARMAN; STANLEY CUM-
MINGS; JOHN A. HRUTKY; and JOHN F.
SCHWELLA,

Plaintiffs,

vs.

PAN-AMERICAN AIRWAYS, INC., a Corpora-
tion; FIRST DOE; SECOND DOE; and
THIRD DOE, a Corporation,

Defendants.

COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT

Come now plaintiffs above named, and for cause
of action against defendants, allege:

I.

That plaintiffs do not know the true names of
defendants sued herein under the fictitious names of
First Doe, Second Doe, and Third Doe, a corpora-
tion, and pray leave to substitute said true names
when ascertained.

II.

That defendant Pan-American Airways, Inc., a
corporation, is a corporation organized and existing
under and by virtue of the laws of a state unknown
to plaintiffs and maintaining an office and place of

business and doing business in the City and County of San Francisco, State of California.

III.

That plaintiff Aubrey L. Charman was first employed by the defendants on or about October 7, 1935, as an Assistant Radio Operator at a salary of approximately \$125 per month. Said plaintiff thereafter continued in the employ of the defendants in various capacities in the defendants' Communications Department and received various increases in salary from time to time until by December of 1940 said plaintiff was earning approximately \$200 per month as a Flight Radio Officer; incident to said plaintiff's employment and as a part thereof, said plaintiff had certain seniority privileges and other advantages, including the right to severance pay in the event of discharge.

IV.

That said plaintiff is informed and believes and therefore alleges that during the latter part of the year 1940 and the early part of the year 1941, defendants established a program of training certain employees in their Communications Department to act as Non-Pilot Navigators; said plaintiff is informed and believes and therefore alleges that this training program was initiated by defendants in order to further defendants' interests because of the need which defendants had at the said time for trained navigators.

V.

That on or about the first day of January, 1941, pursuant to said program, defendants assigned said plaintiff duties as Non-Pilot Navigator in lieu and instead of his duties as a Flight Radio Officer, and that on or about the said last mentioned date, plaintiff entered upon his said newly assigned duties.

VI.

That on or about the 21st day of January, 1941, at San Francisco, California, the defendants executed a written memorandum to said plaintiff in which the defendants agreed as follows:

“This assignment may or may not be of a temporary nature, however, in the event that it is of a temporary nature and it is found no longer necessary to assign you as Navigator, you will resume your duties as Flight Radio Officer with no loss of seniority or other advantages which you now have.”

VII.

That said plaintiff entered upon his duties as a Non-Pilot Navigator under the direction and control of the defendants, and on or about October 16, 1942, said plaintiff was transferred from the defendants' Communications Department to the defendants' Operations Department as a Non-Pilot Navigator and thereupon entered upon his duties as a Non-Pilot Navigator in said Operations Department.

VIII.

That on or about the 22nd day of April, 1943, at San Francisco, California, the defendants executed another written memorandum to said plaintiff, in which the defendant agrees as follows:

“Pan American Airways System

“Memorandum

“April 22, 1943

“Division Operations Manager

“Communication Supt., Acting

“Transpacific

“Treasure Island

“Operations

“Treasure Island

“This refers to a joint letter written by the Division Operations Manager and Division Communication Superintendent of the Transpacific Division to Communications personnel who were qualifying as Navigators.

“That letter stated, among other things, that upon checking out as a Navigator you would receive \$25.00 for navigation duties, in addition to your base pay and flight allowance, in accordance with the Communication pay scale. That letter also stated that you would be eligible for increases in base salary in line with the policy of the Communication Department.

“At that time it was not known whether this would be a permanent or temporary assignment and you were informed by that letter that if it were no

longer necessary to assign you as a Navigator, you would assume your duties as a Flight Radio Officer without loss of seniority or advantages which you had at that time.

“On October 16, 1942, you were transferred to the Operations Department and your salary adjusted so that it would be equivalent to your base pay and flight allowance on the Communications Department scale, plus the \$25.00 for navigation duties.

“The purpose of this letter is to confirm our verbal understanding when the transfer was made, that you would henceforth be on the Navigators’ pay scale, rather than the pay scale of the Communication Department.

“After the war, if the position of Non-Pilot Navigator should be abolished, we will reestablish you in the Communication Department in a grade commensurate with your length of service with the company after permitting you a period to qualify professionally with equipment and procedure current at that time.

“/s/ J. H. TILTON,

“J. H. Tilton.

“/s/ H. O. GENTRY,

“H. O. Gentry.

“CC: Division Manager.”

IX.

That thereafter and until the 15th day of November, 1948, said plaintiff performed his duties as a Non-Pilot Navigator for the defendants in their

Operations Department and from time to time received various increases in pay so that at one time he was earning as much as \$625 per month. His rate of pay on or about said 15th day of November, 1948, was \$600 per month.

X.

That on or about November 15, 1948, the defendants terminated said plaintiff's employment as a Non-Pilot Navigator in the defendants' Operations Department.

XI.

That on or about the 4th day of December, 1948, said plaintiff requested in writing that defendants reinstate him in their Communication Department in a grade commensurate with his length of service with the defendants as provided for in the agreements of January 21, 1941, and April 22, 1943, hereinabove referred to.

XII.

That on or about December 6, 1948, contrary to the terms and provisions of the aforesaid agreements, defendants refused to transfer said plaintiff to their Communications Department and to re-establish him in said Department as they had agreed to do in the said agreements, or to employ the said plaintiff in any other capacity.

XIII.

That said plaintiff has at all times done and performed all of the terms and conditions required of him to be done and performed by the aforesaid

agreements. Said plaintiff is informed and believes and therefore alleges that his services for the defendants in all capacities have at all times been of a satisfactory nature and character and that the defendants' failure to transfer said plaintiff to the Communications Department and to re-establish him therein as in the aforesaid agreements provided is without just cause.

XIV.

That if the defendants had transferred said plaintiff to the Communications Department and had re-established him therein as provided for in the aforesaid agreements, said plaintiff would have on or about December 4, 1948, and continuously thereafter to the date hereof and for an indefinite period in the future, been gainfully employed by the defendants and would have earned approximately \$600 per month. That by reason of defendants' breach of the agreements as aforesaid, said plaintiff has suffered damages in the amount of \$150,000 in lost wages.

XV.

That if the defendants had transferred said plaintiff to the Communications Department and re-established him therein as provided for in the aforesaid agreements, said plaintiff would have had seniority privileges, severance pay privileges and other privileges in connection therewith, the reasonable value of which is \$10,000.

Wherefore, this plaintiff prays judgment against the defendants, and each of them, in the sum of

\$160,000 damages, for his costs of suit herein, and for such other and further relief as to the Court may seem just in the premises.

As and for a Second, Separate and Distinct Cause of Action, plaintiff Stanley Cummings alleges as follows:

I.

Incorporates by reference all of the allegations of Paragraphs I, II, IV, VI, VII, VIII, IX, X, XII, XIII and XV of the first cause of action herein.

II.

That plaintiff Stanley Cummings was first employed by the defendants on or about December 30, 1935, as an Assistant Radio Operator at a salary of approximately \$125 per month. That said plaintiff thereafter continued in the employ of defendants in various capacities in the defendants' Communications Department and received various increases in salary from time to time until by February of 1941, said plaintiff was earning approximately \$200 per month as a Flight Radio Officer; incident to said plaintiff's employment and as a part thereof, said plaintiff had certain seniority privileges and other advantages, including the right to severance pay in the event of discharge.

III.

That on or about the 1st day of February, 1941, pursuant to the program referred to in Paragraph IV of plaintiff Charman's cause of action, defend-

ants assigned said plaintiff Cummings duties as a Non-Flight Navigator in lieu and instead of his duties as a Flight Radio Officer, and that on or about said last mentioned date, said plaintiff entered upon his said newly assigned duties.

IV.

That on or about the 2nd day of December, 1948, said plaintiff requested in writing that the defendants reinstate him in their Communications Department in a grade commensurate with his length of service with the defendants, as provided for in the agreements of January 21, 1941, and April 22, 1943, hereinabove referred to.

V.

That on or about the 6th day of December, 1948, contrary to the terms and provisions of the aforesaid agreements, defendants refused to transfer said plaintiff to the Communications Departments and to re-establish him in that Department as they had agreed to do in said agreements or to employ said plaintiff in any other capacity.

VI.

That if the defendants had transferred said plaintiff to the Communications Department and had re-established him therein as provided for in the aforesaid agreements, said plaintiff would have, on or about December 2, 1948, and continuously thereafter to the date hereof and for an indefinite period in the future, been gainfully employed by the defendants and would have earned approximately \$600

per month. That by reason of defendants' breach of the agreements as aforesaid, said plaintiff has suffered damages in the amount of \$150,000 in lost wages.

Wherefore, plaintiff Stanley Cummings prays judgment against the defendants, and each of them, in the sum of \$160,000, for his costs of suit herein, and for such other and further relief as to the Court may seem just in the premises

As and for a Third, Separate and Distinct Cause of Action, plaintiff John A. Hrutky alleges as follows:

I.

Incorporates by reference all of the allegations of Paragraphs I, II, IV, VII, VIII, IX, X, XII, XIII and XV of the first cause of action herein.

II.

That plaintiff John A. Hrutky was first employed by the defendants on or about July 15, 1937, as Assistant Radio Operator at a salary of approximately \$125 per month. That said plaintiff thereafter continued in the employ of defendants in various capacities in the defendants' Communications Department and received various increases in salary from time to time until by February of 1941 said plaintiff was earning approximately \$200 per month as a Flight Radio Officer; incident to said plaintiff's employment and as a part thereof, said plaintiff had certain seniority privileges and other

advantages, including the right of severance pay in the event of discharge.

III.

That on or about the 1st day of February, 1941, pursuant to the program referred to in Paragraph IV of plaintiff Charman's cause of action, defendants assigned plaintiff Hrutky duties as a Non-Pilot Navigator in lieu and instead of his duties as a Flight Radio Officer and that on or about said last mentioned date, said plaintiff entered upon his said newly assigned duties.

IV.

That on or about the 4th day of December, 1948, said plaintiff requested in writing that the defendants reinstate him in their Communications Department in a grade commensurate with his length of service with the defendants, as provided for in the agreements of January 21, 1941, and April 22, 1943, hereinabove referred to.

V.

That on or about December 6, 1948, contrary to the terms and provisions of the aforesaid agreements, defendants refused to transfer said plaintiff to the Communications Department and to re-establish him in that Department as they had agreed to do in said agreements or to employ said plaintiff in any other capacity.

VI.

That if the defendants had transferred said plaintiff to the Communications Department and had

re-established him therein as provided for in the aforesaid agreements, said plaintiff would have, on or about December 4, 1948, and continuously thereafter to the date hereof and for an indefinite period in the future, been gainfully employed by the defendants and would have earned approximately \$600 per month. That by reason of defendants' breach of the agreements as aforesaid, said plaintiff has suffered damages in the amount of \$150,000 in lost wages.

Wherefore, plaintiff John A. Hrutky prays judgment against defendants, and each of them, in the sum of \$160,000, for his costs of suit herein, and for such other and further relief as to the Court may seem just in the premises.

As and for a Fourth, Separate and Distinct Cause of Action, plaintiff John F. Schwella alleges as follows:

I.

Incorporates by reference all of the allegations of Paragraphs I, II, IV, VII, VIII, IX, X, XII, XIII and XV of the first cause of action herein.

II.

That plaintiff John F. Schwella was first employed by the defendants on or about November 16, 1937, as an Assistant Radio Operator at a salary of approximately \$125 per month. That said plaintiff thereafter continued in the employ of defendants in various capacities in the defendants' Communications Department and received various increases in

salary from time to time until by July of 1942, said plaintiff was earning approximately \$200 per month as a Flight Radio Officer; incident to said plaintiff's employment and as a part thereof, said plaintiff had certain seniority privileges and other advantages, including the right to severance pay in the event of discharge.

III.

That on or about the 1st day of July, 1942, defendants assigned said plaintiff, pursuant to the program referred to in Paragraph IV of plaintiff Charman's cause of action, duties as a Non-Pilot Navigator in lieu and instead of his duties as a Flight Radio Officer and that on or about said last mentioned date, said plaintiff Hrutky entered upon his newly assigned duties as a Non-Pilot Navigator.

IV.

That on or about the 1st day of December, 1948, said plaintiff requested in writing that the defendants reinstate him in their Communications Department in a grade commensurate with his length of service with the defendants, as provided for in the agreements of January 21, 1941, and April 22, 1943, hereinabove referred to.

V.

That on or about December 6, 1948, contrary to the terms and provisions of the aforesaid agreements, defendants refused to transfer said plaintiff to the Communications Department and to re-establish him in that Department as they had agreed to

do in said agreements or to employ said defendant in any other capacity.

VI.

That if the defendants had transferred said plaintiff to the Communications Department and had re-established him therein as provided for in the aforesaid agreements, said plaintiff would have, on or about December 1, 1948, and continuously thereafter to the date hereof and for an indefinite period in the future, been gainfully employed by the defendants and would have earned approximately \$600 per month. That by reason of defendants' breach of the agreements as aforesaid, said plaintiff has suffered damages in the amount of \$150,000 in lost wages.

Wherefore, plaintiff John F. Schwella prays judgment against defendants, and each of them, in the sum of \$160,000, for his costs of suit herein, and for such other and further relief as to the Court may seem just in the premises.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By NORMAN LEONARD,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco—ss.

Norman Leonard, being first duly sworn, deposes and says:

That he is the attorney for the plaintiffs in the

within action; that he makes this verification for and on behalf of said plaintiffs for the reason that said plaintiffs are presently outside of the county in which affiant has his office; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to such matters that he believes it to be true.

NORMAN LEONARD.

Subscribed and sworn to before me this 24th day of January, 1949.

Sig. attested on orig. Doc. by

ALICE C. MORSE,

Notary Public in and for the City and County of
San Francisco, State of California.

In the Superior Court of the State of California,
in and for the City and County of San Francisco

No. 383485

AUBREY L. CHARMAN; STANLEY CUM-
MINGS; JOHN A. HRUTKY; and JOHN F.
SCHWELLA,

Plaintiffs,

vs.

PAN AMERICAN AIRWAYS, INC., a Corpora-
tion; FIRST DOE, SECOND DOE and
THIRD DOE, a Corporation,

Defendant.

Action brought in the Superior Court of the
State of California in and for the City and County
of San Francisco, and the complaint filed in the office
of the County Clerk of said City and County.

GLADSTEIN, ANDERSEN, RESNER &
SAWYER,

Attorneys for Plaintiff.

SUMMONS

The People of the State of California Send Greet-
ing To:

Pan American Airways, Inc., a Corporation; First
Doe; Second Doe; and Third Doe, a Corporation,
Defendants.

You Are Hereby Directed to appear and answer
the complaint in an action entitled as above, brought

against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons—if served within this City and County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff—will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the City and County of San Francisco, State of California.

Dated January 25, 1949.

MARTIN MONGAN,
Clerk.

[Seal] By /s/ D. T. WOOD,
Deputy Clerk.

In the District Court of the United States for the
Northern District of California, Southern Di-
vision

No. 28639H

AUBREY L. CHARMAN; STANLEY CUM-
MINGS; JOHN A. HRUTKY and JOHN F.
SCHWELLA,

Plaintiffs,

vs.

PAN AMERICAN AIRWAYS, INC., a Corpora-
tion; FIRST DOE; SECOND DOE; and
THIRD DOE, a Corporation,

Defendants.

PETITION FOR REMOVAL OF
CIVIL ACTION

Comes now Pan American Airways, Inc., a cor-
poration, defendant above-named, and files this ver-
ified petition for removal, and respectfully alleges
as follows:

I.

That there is pending in the Superior Court of
the State of California, in and for the City and
County of San Francisco, to wit, within the district
and division of the above-entitled court, a civil ac-
tion brought by the above-entitled plaintiffs against
the above-entitled defendants, and numbered therein
No. 383,485.

II.

That process in said action was served upon this
defendant on the 8th day of February, 1949.

III.

That the said plaintiffs are each citizens of the State of California; that defendant Pan American Airways, Inc., is a corporation incorporated under the laws of the State of New York; and that there are no other parties in interest properly joined or served as defendants in said action.

IV.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000).

V.

That attached hereto are copies of all process, pleadings and orders served upon said defendant in said action.

VI.

That this petition is accompanied by a bond with good and sufficient surety conditioned that the defendant will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, said defendant prays that said action be removed to this court, and that this court issue all necessary orders in connection therewith.

ATHEARN, CHANDLER & FARMER, HOFF-
MAN & ANGELL,

/s/ F. G. ATHEARN,

/s/ LEIGH ATHEARN,

Attorneys for Defendant.

The United States of America,
Northern District of California—ss.

Leigh Athearn, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant Pan American Airways, Inc., in the foregoing action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein alleged upon information or belief, and as to those matters he believes it to be true; and that this verification is made by affiant as such attorney because he is familiar with the facts stated in said petition.

/s/ LEIGH ATHEARN.

Subscribed and sworn to before me this 18th day of February, 1949.

[Seal] /s/ VIOLET NEURENBURG,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Jan. 3, 1951.

[Endorsed]: Filed February 21, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now defendant Pan American Airways, Inc., and for answer to plaintiffs' complaint herein, admits, denies and alleges as follows:

Answer to Complant of Plaintiff Charman

I.

Answering paragraph I of the complaint of plaintiff Aubrey L. Charman, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

II.

Answering paragraph II of the complaint of said plaintiff, defendant alleges that it is a corporation organized and existing under and by virtue of the laws of the State of New York, and is lawfully doing business in the State of California.

III.

Answering paragraph III of the complaint of said plaintiff, defendant admits the allegations thereof, save and except to deny that incident to said plaintiffs' employment during the years from 1935 to and including 1940, or as a part thereof, or otherwise, said plaintiff had any legally binding seniority privileges or similar rights, or the right to severance pay of any kind.

IV.

Answering paragraph IV of the complaint of said plaintiff, defendant denies the allegations thereof; and defendant alleges that in the year 1940 and for several years prior thereto defendant was engaged and now is engaged in the business of rendering international air transport service; that until the latter part of 1940 it was the custom and practice

of defendant to employ, as pilots of the aircraft engaged in said service, persons who were not only skilled and qualified to pilot such aircraft, but also trained and qualified in the art of navigation; that in the latter part of 1940, due to increased wartime demands upon the service rendered by defendant, including demands of the armed services, it became necessary for defendant to employ greatly expanded numbers of pilots to operate the aircraft engaged in such service; that it was not then possible to obtain in sufficient numbers pilot personnel who were also trained as navigators; that it was therefore necessary for defendant to supplement the said flight crews by employing and adding thereto a member of the crew designated as a non-pilot navigator (sometimes designated as a professional navigator,) who undertook navigational duties aboard said aircraft; that defendant hired qualified persons to take jobs as non-pilot navigators, and further initiated a program to train as non-pilot navigators persons then in the employ of defendant who were qualified to receive such training and who wished to become non-pilot navigators in order to receive increased pay.

V.

Answering paragraph V of the complaint of said plaintiff, defendant denies the allegations thereof; and defendant alleges that on or about the date therein alleged said plaintiff having received training as a non-pilot navigator, applied for transfer to duty as a non-pilot navigator, and that said request was granted by defendant.

VI.

Answering paragraph VI of the complaint of said plaintiff, defendant admits the allegations thereof, save and except to deny that said memorandum dated January 21, 1941, constituted an agreement or undertaking by defendant, and to allege that said memorandum was intended as, and would reasonably have been understood as, merely the statement of future plan or intention on the part of defendant, and was actually so understood by the parties, and was not intended, would not reasonably be understood, and actually was not understood, to be an agreement or promise by defendant of a binding legal nature.

VII.

Answering paragraph VII of the complaint of said plaintiff, defendant admits the allegations thereof.

VIII.

Answering paragraph VIII of the complaint of said plaintiff, defendant admits the allegations thereof, save and except to deny that said memorandum dated April 22, 1943, constituted an agreement or undertaking by defendant, and to allege that said memorandum was intended as, and would reasonably have been understood as, merely the statement of future plan or intention on the part of defendant, and was actually so understood by the parties, and was not intended, and would not reasonably be understood and actually was not under-

stood, to be an agreement or promise by defendant of a binding legal nature.

IX.

Answering paragraph IX of the complaint of said plaintiff, defendant admits the allegations thereof.

X.

Answering paragraph X of the complaint of said plaintiff, defendant admits the allegations thereof.

XI.

Answering paragraph XI of the complaint of said plaintiff, defendant admits the allegations thereof.

XII.

Answering paragraph XII of the complaint of said plaintiff, defendant denies the allegations thereof, save and except to admit that defendant did not and has not re-employed said plaintiff.

XIII.

Answering paragraph XIII of the complaint of said plaintiff, defendant denies the allegations thereof, save and except to admit that the services of said plaintiff were of a satisfactory nature and character.

XIV.

Answering paragraph XIV of the complaint of said plaintiff, defendant denies the allegations thereof.

XV.

Answering paragraph XV of the complaint of

said plaintiff, defendant denies the allegations thereof.

Answer to Complaint of Plaintiff Cummings

I.

Answering I of the complaint of plaintiff Stanley Cummings, defendant incorporates by reference the allegations of paragraph I, II, IV, VI, VII, VIII, IX, X, XII, XIII and XV of its answer to the complaint of plaintiff Aubrey L. Charman.

II.

Answering paragraph II of the complaint of said plaintiff, defendant incorporates by reference the allegations of paragraph III of its answer to the complaint of plaintiff Aubrey L. Charman.

III.

Answering paragraph III of the complaint of said plaintiff, defendant incorporates by reference the allegations of paragraph V of its answer to the complaint of plaintiff Aubrey L. Charman.

IV.

Answering paragraph IV of the complaint of said plaintiff, defendant incorporates by reference the allegations of paragraph XI of its answer to the complaint of plaintiff Aubrey L. Charman.

V.

Answering paragraph V of the complaint of said plaintiff, defendant incorporates by reference the

allegations of paragraph XII of its answer to the complaint of plaintiff Aubrey L. Charman.

VI.

Answering paragraph VI of the complaint of said plaintiff, defendant incorporates by reference the allegations of paragraph XIV of its answer to the complaint of plaintiff Aubrey L. Charman.

Answer to Complaint of Plaintiff Hrutky

I.

Answering the complaint of plaintiff John A. Hrutky, defendant incorporates by reference its answer to the complaint of plaintiff Stanley Cummings as and for its answer to each paragraph bearing the similar number in the complaint of plaintiff John A. Hrutky.

Answer to Complaint of Plaintiff Schwella

I.

Answering the complaint of plaintiff John F. Schwella, defendant incorporates by reference its answer to the complaint of plaintiff Stanley Cummings as and for its answer to each paragraph bearing the similar number in the complaint of plaintiff John F. Schwella.

First Separate Answer

As and for a first separate answer to the complaint of each of said plaintiffs, defendant alleges:

I.

Defendenat incorporates by reference paragraphs IV and V of its answer to the complaint of Aubrey L. Charman.

II.

That defendant is informed and believes that on or about the 27th day of October, 1944, the plaintiffs and each of them executed and delivered to the Pan American Airways Navigators' Association, an unincorporated association, an authorization form reading as follows:

“I hereby agree that the Board of Directors of the Pan American Airways Navigators Association shall represent me in the negotiation of a contract with Pan American Airways concerning wages and working conditions.

“I further agree that the said Board of Directors, or any agent or agents appointed by the Board, shall have full authority to come to any agreement which they consider just and reasonable.”

III.

That on or about the 20th day of December, 1944, the defendant issued a memorandum to all persons then employed by defendant as navigators stating that, when the defendant resumed its policy to use navigators who also were pilots, the defendant would exercise its best efforts to place navigators who were not also pilots in other available positions, in the defendant's employ, for which they were qualified; and that said memorandum further ad-

vised such navigators of the method and procedure by which they might apply for such other positions.

IV.

That on or about the 4th day of January, 1945, the said Pan American Airways Navigators' Association, on behalf of the plaintiffs (and certain other persons then in defendant's employ) executed an agreement with defendant (in which said agreement the defendant was referred to as "the Company") governing the wages, hours and working conditions, including seniority and reinstatement rights of the plaintiffs (and such other persons); that said agreement provided in paragraph (c) of section 3 thereof as follows:

"In addition, the Company will exercise its best efforts to place Navigators in available positions for which they are qualified when the the policy of using Pilot-Navigators is resumed. The method by which the Company will endeavor to make such assignments available to Navigators and the procedure for giving additional training to Navigators who have been selected will be that described in the memorandum on this subject dated December 20, 1944."

V.

That it was the effect and purpose of said agreement dated the 4th day of January, 1945, and it was so understood by the parties, and reasonably would be so understood, that the same replaced, superseded, and was a novation of any and all agree-

ments or understandings previously existing, if any such existed, between the defendant and the employees who were parties thereto and the beneficiaries thereof (including the plaintiffs and each of them) affecting wages, hours and working conditions, including seniority and reinstatement rights; that the rights of plaintiffs, if any they had, under the memoranda dated the 21st day of January, 1941, and the 22nd day of April, 1943, referred to in their complaints, were replaced, superseded and subject to a novation by said agreement dated the 4th day of January, 1945; that thereafter the plaintiffs had no rights to seniority or reinstatement save and except as provided in said agreement dated the 4th day of January, 1945; that the plaintiffs and each of them accepted the benefits of said agreement dated on the 4th day of January, 1945, and ratified and confirmed the making of said agreement on their behalf.

VI.

That said Pan American Airways Navigators' Association thereafter became affiliated with and became a part of the Transport Workers Union of America (CIO); that the plaintiffs and each of them continued to designate and authorize said Transport Workers Union of America (CIO) to represent the plaintiffs and each of them for purposes of negotiating and signing, on behalf of plaintiffs and others, agreements with the defendant governing the wages, hours and working conditions, including seniority and reinstatement rights; that on the 31st day of December, 1946, an agreement

was signed between the defendant and the said Transport Workers Union of America (CIO,) representing the plaintiffs and others, which replaced, superseded and was a novation of said agreement dated the 4th day of January, 1945.

Second Separate Answer

As and for a second, separate answer to the complaint of each of said plaintiffs, defendant alleges:

I.

That at all times mentioned in said complaint the defendant has been, and now is, engaged in business as a common carrier by air in interstate and foreign commerce, and further as a carrier by air transporting mail for and under contract with the United States Government; and that the defendant therefore during said period continuously has been and now is subject to the terms and provisions of the act of Congress known as the Railway Labor Act (45 U.S. Code §§151 to 163, and 181 to 188).

II.

That shortly before the 17th day of April, 1946, the Flight Radio Officers Association, an unincorporated association, furnished evidence to the defendant, in conformity with the provisions of the Railway Labor Act, that the Flight Radio Officers Association had been duly designated as the representative of the flight radio officers and the flight radio officer trainees employed by the defendant and, on their behalf, to negotiate and conclude an

employment agreement with the defendant covering hours of work, wages and other working conditions.

III.

That on or about the 17th day of April, 1946, the defendant and said Flight Radio Officers Association entered into an agreement designated "Agreement for the Establishment of a System Seniority Board for Flight Radio Officers"; that said agreement provided, in part, as follows:

"(b) For the purpose of compiling an initial Seniority List on a System-wide basis for Flight Radio Officers in the employ of Pan American Airways, Inc., a Seniority Board is hereby appointed, consisting of four members, two of whom are to be appointed by the Company and two by the Flight Radio Officers Association.

"(c) The Seniority Board so named shall as soon as possible compile separate lists of Active and Inactive Flight Radio Officers who are or have been employed by the Pan American Airways, Inc., in the order of their seniority.

"(d) The Inactive List shall include former Flight Radio Officers who are now in other positions within the Communications Department and those who have been released due to reduction in force.

"(e) The Seniority Board in the establishment of a Seniority List shall adhere to the seniority provisions in this Agreement, provided that where records are not conclusive or are missing, the Seniority

Board may use whatever means it deems necessary to supplement such records.

“(f) The Seniority Board shall convene within sixty (60) days after the signing of this Agreement and compile a Seniority List on which shall appear the names of employees, Active or Inactive, entitled to seniority. The completed Seniority List shall be posted on all bulletin boards where Flight Radio Officers are based.

“(g) An employee shall be privileged to protest his position on the Seniority List provided that such protest is in writing outlining the reasons therefor and is made to the Seniority Board within sixty (60) days after the Seniority List is posted, and provided further that such protests do not conflict with any provisions of this Agreement.

“(h) Within sixty (60) days after the time period to file protest with the Board has ended the Seniority Board will convene, if necessary, and shall make all determinations of questions contained in seniority protests.

“(i) The determination of the Board relating to Seniority protests shall be final and binding on the employee and the Company.”

IV.

That after the execution of said agreement dated the 17th day of April, 1946, the defendant proposed to the System Seniority Board, therein established, names of the employees affected and data for the determination of the seniority rank or status of each; and that included upon the list so proposed by

defendant were the names of each of the plaintiffs.

V.

That on or about the 26th day of June, 1946, the defendant and said Flight Radio Officers Association found that they were unable to agree upon the terms of a collective bargaining agreement then being negotiated between them; that upon said date they applied to the National Mediation Board for mediation services, all as provided in said Railway Labor Act; that said National Mediation Board accepted said matter as N.M.B. case number A2381, and proceeded to act as provided in said Railway Labor Act; that on or about October 28, 1946, in the presence of a representative of said National Mediation Board, said parties reached an agreement; and that on or about the 4th day of November, 1946, said matter was ordered closed and terminated by said National Mediation Board.

VI.

That said agreement dated the 28th day of October, 1946, between the defendant and the Flight Radio Officers Association, as mediated by and executed in the presence of said National Mediation Board, governed the hours of work, wages and other working conditions of flight radio officers and flight radio officer trainees in the defendant's employ; that as respects seniority said agreement confirmed and adopted said agreement dated the 17th day of April, 1946; and that within thirty (30) days after the execution of said agreement dated the 28th day of October, 1946, the defendant filed the same with

the National Mediation Board, as required by said Railway Labor Act.

VII.

That on or about the 19th day of November, 1946, the said System Seniority Board issued the initial seniority list for flight radio officers in the employ of defendant; and that the names of none of the plaintiffs appeared thereon.

VIII.

That said Flight Radio Officers Association thereafter affiliated with and became a part of the Transport Workers Union of America (CIO,) which thereafter furnished evidence that it continued to be duly designated as the representative of the flight radio officers and flight radio officer trainees employed by the defendant; that on the 6th day of February, 1948, the defendant and the said Transport Workers Union of America (CIO) entered into an agreement, superseding the said agreement dated the 28th day of October, 1946, governing the hours of work, wages and other working conditions of flight radio officers and flight radio officer trainees in the employ of defendant.

IX.

That said agreement dated the 6th day of February, 1948, provided in Article 9 thereof as follows:

“(a) Seniority hereunder shall be determined by the Flight Radio Officers’ System Seniority List of Pan American Airways, Inc., dated April 11, 1947, and as hereafter adjusted in accordance with the provisions of this Agreement.

“(b) A Seniority Board consisting of two members designated by the Union and two members designated by the Company shall meet twice each year for the purpose of adding and removing names, to act upon protests and to make such adjustments in the Flight Radio Officer System Seniority List as may be necessary and proper under this Agreement.

“(c) A new Flight Radio Officer hereunder shall accrue seniority from the date of departure on a productive flight; that is, a flight on which he is assigned not solely for his own training. When two or more employees depart on their first productive flight on the same date, their relative seniority standing shall be determined by lottery.

“(d) When the Seniority Board has completed the adjusted Flight Radio Officer System Seniority List, it shall cause to be posted copies of the List at all Fields where employees hereunder are based, and employees shall have the right to protest inaccuracies or omissions within sixty (60) days from the date of posting. A protest, other than typographical error, shall not be valid if the above seniority Board has once acted on it.”

X.

That within thirty (30) days after the execution of said agreement dated the 6th day of February, 1948, the defendant filed the same with the National Mediation Board, as required by law; and that said agreement is now in full force and effect.

XI.

That the name of none of the plaintiffs appears upon the said Flight Radio Officers' System Seniority List; that the said System Seniority Board caused said list to be posted as required by said agreements hereinabove set forth; that none of the plaintiffs protested or attempted to protest the omission of his name therefrom, either as required by said agreements or otherwise.

XII.

That the defendant is, as hereinabove alleged, prevented by law, to wit, by said agreement dated the 6th day of February, 1948, as executed in the presence of and duly filed with the National Mediation Board, from employing any of the plaintiffs as a flight radio officer.

XIII.

That, further, even if each of the plaintiffs had been placed upon said System Seniority List, under an interpretation of said agreements most favorable to said plaintiffs, none of the plaintiffs would have sufficient accrued seniority thereunder to make him eligible for reinstatement to a position as flight radio officer in the defendant's employ, since there are men with greater accrued seniority than any plaintiff might have who are on "laid-off status," that is, seeking reinstatement with the defendant as flight radio officers but unable to obtain the same because of lack of available positions.

Third Separate Answer

As and for a third separate answer to the complaint of each of said plaintiffs, defendant alleges:

I.

That on several occasions since the middle of 1946, the defendant has offered to each of the plaintiffs employment in the communications department of defendant at a grade commensurate with the length of service of each said plaintiff; and that each said plaintiff refused and declined to accept said offers when made.

Fourth Separate Answer

As and for a fourth separate answer to the complaint of each of said plaintiffs, defendant alleges:

I.

Defendant incorporates by reference paragraphs II, IV, V and VI of its first separate answer above set forth.

II.

That on or about the 14th day of July, 1948, said Transport Workers Union of America (CIO,) acting for and on behalf of the plaintiffs and others, entered into an agreement with the defendant, which said agreement submitted to a board of arbitration for decision the question of what rights of seniority or rights to retention of employment, if any, the plaintiffs and others might have as against the defendant.

III.

That on or about the 10th day of November, 1948, said board of arbitration rendered its award, which stated in paragraph 1 as follows:

“1. It is the decision and award of this Board of Arbitration that Pan American Airways, Inc., shall not be required to retain the professional navigators in its employ, except for work in accordance with the established practice as ground instructors in navigation. At the discretion of the Company they may be used as navigation instructors in flight.”

That said award provided further in paragraphs 3, 4 and 5 thereof as follows:

“3. Upon dismissal each of the professional navigators employed by the Company will be given as severance pay the sum of \$2,000 which will include the amount that would be payable under Article 18(f) of the parties' agreement of December 31, 1946; they will also receive payment for vacation earned or accrued but not taken and refunds due under the Company insurance and retirement plans.

“4. Provisions of the agreement of the parties on seniority and related matters inconsistent with this award are deemed superseded or amended accordingly.

“5. The provisions of this award shall become effective as of the close of business on November 15, 1948.”

IV.

That on or about the 15th day of November, 1948, the services of each of the plaintiffs were terminated by the defendant, and that each of said plaintiffs was then paid by defendant the sum of \$2,000 as severance pay, plus payment for vacation earned or accrued but not taken and refunds due under the defendant's insurance and retirement plans.

Wherefore, defendant prays that none of the plaintiffs take anything by their said complaints, and that defendant be dismissed with its costs.

Dated: March 7, 1949.

ATHEARN, CHANDLER & FARMER, HOFF-
MAN & ANGELL,

/s/ F. G. ATHEARN,

/s/ LEIGH ATHEARN,

Attorneys for Defendant.

Receipt of a copy of the foregoing answer is admitted this 7th day of March, 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
Attorneys for Plaintiffs.

[Endorsed]: Filed March 9, 1949.

[Title of District Court and Cause.]

Order Directing Amendment of Pleadings and Limiting Issues After Pretrial Conference

In this action, the Court having ordered the attorneys for the respective parties hereto appear before it for pretrial conference; and said pretrial conference having been held on October 17 and 31, 1949; it is hereby

Ordered as follows:

1. Amendment of Pleadings.

That pursuant to the defendant's written motion dated April 28, 1949, leave is granted to the defendant to amend and supplement its answer by adding Paragraph XIV to the Second Separate Answer as set forth in said motion, and said Answer is hereby deemed amended and supplemented as therein set forth.

2. Admissions of Fact.

That the parties hereto have made the following admissions of fact:

(a) That during the entire period during which the plaintiffs were originally employed by defendant as flight radio officers (that is, prior to the time they became navigators), there was no written contract of employment in effect between the plaintiffs and the defendant;

(b) That at all times from and after October 27, 1944, to the time of the date of termination of their respective employments with the defendant, each of the plaintiffs was a member of the Transport

Workers of America, CIO (or its predecessor organization, the Pan American Airways Navigators' Association) ;

(c) That at all times mentioned in the complaint the defendant has been subject to the Railway Labor Act, as a carrier by air ;

(d) That data regarding the employment of each of the plaintiffs was submitted by the defendant to the System Seniority Board for Flight Radio Officers established under an agreement dated April 17, 1946 ; that the name of none of the plaintiffs appeared upon the initial seniority list for flight radio officers when issued by said Board ; and that the name of none has thereafter been added thereto ;

(e) That each of the plaintiffs received a check from the defendant on or about November 15, 1948, in the sum of \$2,000.

3. Plaintiffs' Exhibits.

That the genuineness and due execution, but not the materiality or legal effect, of the following exhibits offered by the plaintiffs has been admitted by the defendant :

(a) Memorandum dated January 21, 1941, over signatures of G. W. Angus and J. C. Leslie ;

(b) Memorandum dated April 22, 1943, over signatures of J. H. Tilton and H. O. Gentry.

4. Defendant's Exhibits.

That the genuineness and due execution, but not the materiality or legal effect, of the following ex-

hibits offered by the defendant has been admitted by the plaintiffs:

(a) Agreement dated January 4, 1945, between the defendant and Pan American Airways Navigators' Association;

(b) Memorandum dated December 20, 1944, captioned "Training and Placement Program for Navigators";

(c) Agreement dated December 31, 1946, between defendant and Transport Workers Union of America, C.I.O.;

(d) Agreement dated October 28, 1946, between defendant and Flight Radio Officers Association (including agreement dated April 16, 1946, appended thereto).

(e) Agreement dated February 6, 1948, between defendant and Transport Workers Union of America, C.I.O. (including agreement dated January 12, 1948, and memorandum dated February 6, 1948, appended thereto).

(f) Memorandum dated April 2, 1949, in settlement of differences in Docket Case A-3102 of the National Mediation Board (including memorandum of agreement dated April 2, 1949, appended thereto).

(g) Award dated November 10, 1948, in the matter of an arbitration between the defendant and the Transport Workers Union of America, C.I.O.;

(h) Letters dated March 4, 1949, from defendant to each of plaintiffs;

(i) Letter dated March 14, 1949, from Norman Leonard, Esq., to defendant;

(j) Letter dated March 18, 1949, from Leigh Athearn, Esq., to Messrs. Gladstein, Andersen, Resner & Sawyer.

Done in Open Court this 7th day of November, 1949.

/s/ GEORGE B. HARRIS,
District Judge.

We hereby consent to the making of the above order.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
Attys. for Plaintiffs.

ATHEARN, CHANDLER
& FARNUM,

HOFFMAN & ANGELL,
/s/ THEODORE P. LAMBROC.

[Endorsed]: Filed November 7, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on April 27 and 28, and May 3, 1950, before the court sitting without a jury, a jury having been expressly waived, Gladstein, Andersen, Resner & Sawyer and Norman Leonard appearing as counsel

for plaintiffs, and Athearn, Chandler, Hoffman & Angell, Fred G. Athearn, Leigh Athearn, Hugh Knowlton, Jr., and Charles F. Hamlin appearing as counsel for defendant Pan American World Airways, Inc. (sued herein as Pan American Airways, Inc.), and the court having heard testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

Upon the complaint of the plaintiff Aubrey L. Charman the court finds:

Findings on Complaint of Plaintiff Charman

1. That the defendants sued as First Doe, Second Doe, and Third Doe, a corporation, do not exist and are not parties to this action.

2. That on January 3, 1950, the name of the defendant Pan American Airways, Inc., was changed to Pan American World Airways, Inc., and that said corporation (hereinafter referred to as the defendant) is organized and exists under and by virtue of the laws of the State of New York.

3. That it is true that plaintiff Charman was first employed by the defendant on October 7, 1935, as an Assistant Radio Operator at a salary of \$125.00 per month; that said plaintiff thereafter continued in the employ of defendant in various

capacities in the defendant's Communications Department and received various increases in salary from time to time until by December of 1940 said plaintiff was earning approximately \$200.00 per month as a Flight Radio Officer; that the balance of the allegations in Paragraph III of the complaint of said plaintiff are not true; and that it is true that incident to said plaintiff's employment during the years from 1935 to and including 1940, said plaintiff had no legally binding seniority privileges or similar rights, or the right to severance pay of any kind.

4. That the allegations of paragraph IV of the complaint of said plaintiff are not true; and that it is true that in the year 1940 and for several years prior thereto defendant was engaged and now is engaged in the business of rendering international air transport service; that until the latter part of 1940 it was the custom and practice of defendant to employ, as pilots of the aircraft engaged in said service, persons who were not only skilled and qualified to pilot such aircraft, but also trained and qualified in the art of navigation; that in the latter part of 1940, due to increased wartime demands upon the service rendered by defendant, including demands of the armed services, it became necessary for defendant to employ greatly expanded numbers of pilots to operate the aircraft engaged in such service; that it was not then possible to obtain in sufficient numbers pilot personnel who were also trained as navigators; that it was therefore neces-

sary for defendant to supplement the said flight crews by employing and adding thereto a member of the crew designated as a non-pilot navigator (sometimes designated as a professional navigator), who undertook navigational duties aboard said aircraft; that defendant hired qualified persons to take jobs as non-pilot navigators, and further initiated a program to train as non-pilot navigators persons then employed by defendant who were qualified to receive such training and who wished to become non-pilot navigators in order to receive increased pay.

5. That the allegations of paragraph V of the complaint of said plaintiff are not true, save and except that it is true that on or about the date therein alleged said plaintiff having received training as a non-pilot navigator, applied for transfer to duty as a non-pilot navigator, and that said request was granted by defendant.

6. That it is true that on the 21st day of January, 1941, at San Francisco, California, the defendant executed a written memorandum to said plaintiff in which the defendant stated as follows:

“This assignment may or may not be of a temporary nature, however, in the event that it is of a temporary nature and it is found no longer necessary to assign you as Navigator, you will resume your duties as Flight Radio Officer with no loss of seniority or other advantages which you now have,”

and the court finds further that said memorandum dated January 21, 1941, did not constitute an agreement or undertaking by defendant, and that said memorandum was intended as, and would reasonably have been understood as, merely the statement of future plan or intention on the part of defendant, and was actually so understood by the parties, and was not intended, would not reasonably be understood, and actually was not understood, to be an agreement or promise by defendant of a binding legal nature.

7. That it is true that said plaintiff entered upon his duties as a non-pilot navigator under the direction and control of the defendant, and on or about October 16, 1942, said plaintiff was transferred from the defendant's Communications Department to the defendant's Operations Department as a non-pilot navigator and thereupon entered upon his duties as a non-pilot navigator in said Operations Department.

8. That it is true that on the 22nd day of April, 1943, at San Francisco, California, the defendant executed another written memorandum to said plaintiff, in which the defendant stated as follows:

“Pan American Airways System

Memorandum

April 22, 1943

Division Operations Manager

Communication Supt., Acting

Transpacific

Treasure Island

“Operations

“Treasure Island

“This refers to a joint letter written by the Division Operations Manager and Division Communications Superintendent of the Transpacific Division to Communications personnel who were qualifying as Navigators.

“That letter stated, among other things, that upon checking out as a Navigator you would receive \$25.00 for navigation duties, in addition to your base pay and flight allowance, in accordance with the Communications pay scale. That letter also stated that you would be eligible for increases in base salary in line with the policy of the Communication Department.

“At that time it was not known whether this would be a permanent or temporary assignment and you were informed by that letter that if it were no longer necessary to assign you as a Navigator, you would assume your duties as a Flight Radio Officer without loss of seniority or advantages which you had at that time.

“On October 16, 1942, you were transferred to the Operations Department and your salary ad-

justed so that it would be equivalent to your base pay and flight allowance on the Communications Department scale, plus the \$25.00 for navigation duties.

“The purpose of this letter is to confirm our verbal understanding when the transfer was made, that you would henceforth be on the Navigators’ pay scale, rather than the pay scale of the Communication Department.

“After the war, if the position of Non-pilot Navigator should be abolished, we will reestablish you in the Communication Department in a grade commensurate with your length of service with the company after permitting you a period to qualify professionally with equipment and procedure current at that time.

“/s/ J. H. TILTON

J. H. Tilton

/s/ H. O. GENTRY

H. O. Gentry

“CC: Division Manager”

and the court further finds that said memorandum dated April 22, 1943, did not constitute an agreement or undertaking by defendant, and that said memorandum was intended as, and would reasonably have been understood as, merely the statement of future plan or intention on the part of defendant, and was actually so understood by the parties, and was not intended, and would not reasonably be understood and actually was not understood, to be an

agreement or promise by defendant of a binding legal nature.

9. That it is true that thereafter and until the 15th day of November, 1948, said plaintiff performed his duties as a non-pilot navigator for the defendant in its Operations Department and from time to time received various increases in pay so that at one time he was earning as much as \$625.00 per month; and that his rate of pay on said 15th day of November, 1948, was \$600.00 per month.

10. That it is true that on November 15, 1948, the defendant terminated said plaintiff's employment as a non-pilot navigator in the defendant's Operations Department.

11. That it is true that on the 4th day of December, 1948, said plaintiff requested in writing that defendant reinstate him in its Communication Department in a grade commensurate with his length of service with the defendant.

12. That the allegations of paragraph XII of the complaint of said plaintiff are not true, save and except that it is true that defendant did not and has not reemployed said plaintiff.

13. That the allegations of paragraph XIII of the complaint of said plaintiff are not true, save and except that it is true that the services of said plaintiff were of a satisfactory nature and character.

14. That the allegations of paragraph XIV of the complaint of said plaintiff are not true; and

that the said plaintiff has not shown that he suffered any damages by way of lost wages by reason of his not being reemployed by the defendant, irrespective of whether the defendant did or did not agree to reemploy him.

15. That the allegations of paragraph XV of the complaint of said plaintiff are not true; and that said plaintiff has not shown that he suffered any damages by way of loss of seniority privileges, severance pay privileges, and other privileges, by reason of his not being reemployed by the defendant, irrespective of whether the defendant did or did not agree to reemploy him.

Findings on Complaint of Plaintiff Cummings

Upon the complaint of the plaintiff Stanley Cummings the court finds:

1. As its findings on paragraph I of the complaint of plaintiff Stanley Cummings, the court makes findings identical to paragraphs 1, 2, 4, 6, 7, 8, 9, 10, 13 and 15 of its findings on the complaint of plaintiff Aubrey L. Charman.

2. As its findings on paragraph II of the complaint of said plaintiff, the court makes findings identical to paragraph 3 of its findings on the complaint of plaintiff Aubrey L. Charman.

3. As its findings on paragraph III of the complaint of said plaintiff, the court makes findings identical to paragraph 5 of its findings on the complaint of plaintiff Aubrey L. Charman.

4. As its findings on paragraph IV of the complaint of said plaintiff, the court makes findings identical to paragraph 11 of its findings on the complaint of plaintiff Aubrey L. Charman.

5. As its findings on paragraph V of the complaint of said plaintiff, the court makes findings identical to paragraph 12 of its findings on the complaint of plaintiff Aubrey L. Charman.

6. As its findings on paragraph VI of the complaint of said plaintiff, the court makes findings identical to paragraph 14 of its findings on the complaint of plaintiff Aubrey L. Charman.

Findings on Complaint of Plaintiff Hrutky

Upon the complaint of the plaintiff John A. Hrutky, the court finds:

1. The court incorporates by reference its findings on the complaint of plaintiff Stanley Cummings as and for its findings on each paragraph bearing the similar number in the complaint of plaintiff John A. Hrutky.

Findings on Complaint of Plaintiff Schwella

Upon the complaint of the plaintiff John F. Schwella, the court finds:

1. The court incorporates by reference its findings of the complaint of plaintiff Stanley Cummings as and for its findings on each paragraph bearing the similar number in the complaint of plaintiff John F. Schwella.

Findings on First Separate Answer

Upon the first separate answer of defendant the court finds:

1. The court incorporates by reference paragraphs 4 and 5 of its findings on the complaint of Aubrey L. Charman.

2. That it is true that on the 27th day of October, 1944, each of the plaintiffs executed and delivered to the Pan American Airways Navigators' Association, an unincorporated association, an authorization form reading as follows:

"I hereby agree that the Board of Directors of Pan American Airways Navigators Association shall represent me in the negotiation of a contract with Pan American Airways concerning wages and working conditions.

"I further agree that the said Board of Directors, or any agent or agents appointed by the Board, shall have full authority to come to any agreement which they consider just and reasonable."

3. That it is true that on the 20th day of December, 1944, the defendant issued a memorandum to all persons then employed by defendant as navigators stating that, when the defendant resumed its policy to use navigators who also were pilots, the defendant would exercise its best efforts to place navigators who were not also pilots in other available positions, in the defendant's employ, for which they were qualified; and that said memorandum

further advised such navigators of the method and procedure by which they might apply for such other positions.

4. That it is true that on the 4th day of January, 1945, the said Pan American Airways Navigators' Association, on behalf of the plaintiffs (and certain other persons then in defendant's employ) executed an agreement with defendant (in which said agreement the defendant was referred to as "the Company") governing the wages, hours and working conditions, including seniority and reinstatement rights of the plaintiffs (and such other persons); that said agreement provided in paragraph (c) of section 3 thereof as follows:

"In addition, the Company will exercise its best efforts to place Navigators in available positions for which they are qualified when the policy of using Pilot-Navigators is resumed. The method by which the Company will endeavor to make such assignments available to Navigators and the procedure for giving additional training to Navigators who have been selected will be that described in the memorandum on this subject dated December 20, 1944."

5. That it is true that it was the effect and purpose of said agreement dated the 4th day of January, 1945, and it was so understood by the parties, and reasonably would be so understood, that the same replaced, superseded, and was a novation of any and all agreements or understandings pre-

viously existing, if any such existed, between the defendant and the employees who were parties thereto and the beneficiaries thereof (including the plaintiffs and each of them) affecting wages, hours and working conditions, including seniority and reinstatement rights; that the rights of plaintiffs, if any they had, under the memoranda dated the 21st day of January, 1941, and the 22nd day of April, 1943, referred to in their complaint, were replaced, superseded and subject to a novation by said agreement dated the 4th day of January, 1945; that thereafter the plaintiffs had no right to seniority or reinstatement save and except as provided in said agreement dated the 4th day of January, 1945; that the plaintiffs and each of them accepted the benefits of said agreement dated the 4th day of January, 1945, and ratified and confirmed the making of said agreement on their behalf.

6. That it is true that said Pan American Airways Navigators' Association thereafter became affiliated with and became a part of the Transport Workers Union of America (CIO); that the plaintiffs and each of them continued to designate and authorize said Transport Workers Union of America (CIO) to represent the plaintiffs and each of them for purposes of negotiating and signing, on behalf of plaintiffs and others, agreements with the defendant governing the wages, hours and working conditions, including seniority and reinstatement rights; that on the 31st day of December, 1946, an agreement was signed between the defendant and

the said Transport Workers Union of America (CIO), representing the plaintiffs and others, which replaced, superseded and was a novation of said agreement dated the 4th day of January, 1945.

Findings on Second Separate Answer

Upon the second separate answer of the defendant the court finds:

1. That it is true that at all times mentioned in the complaint the defendant has been, and now is, engaged in business as a common carrier by air in interstate and foreign commerce, and further as a carrier by air transporting mail for and under contract with the United States Government; and that the defendant therefore during said period continuously has been and now is subject to the terms and provisions of the act of Congress known as the Railway Labor Act (45 U. S. Code §§151 to 163, and 181 to 188).

2. That it is true that shortly before the 17th day of April, 1946, the Flight Radio Officers Association, an unincorporated association, furnished evidence to the defendant, in conformity with the provisions of the Railway Labor Act, that the Flight Radio Officers Association had been duly designated as the representative of the flight radio officers and the flight radio officer trainees employed by the defendant and, on their behalf, to negotiate and conclude an employment agreement with the defendant covering hours of work, wages and other working conditions.

3. That it is true that on the 17th day of April, 1946, the defendant and said Flight Radio Officers Association entered into an agreement designated "Agreement for the Establishment of a System Seniority Board for Flight Radio Officers;" that said agreement provided, in part, as follows:

"(b) For the purpose of compiling an initial Seniority List on a System-wide basis for Flight Radio Officers in the employ of Pan American Airways, Inc., a Seniority Board is hereby appointed, consisting of four members, two of whom are to be appointed by the Company and two by the Flight Radio Officers Association.

"(c) The Seniority Board so named shall as soon as possible compile separate lists of Active and Inactive Flight Radio Officers who are or have been employed by the Pan American Airways, Inc., in the order of their seniority.

"(d) The Inactive list shall include former Flight Radio Officers who are now in other positions within the Communications Department and those who have been released due to reduction in force.

"(e) The Seniority Board in the establishment of a Seniority List shall adhere to the seniority provisions in this Agreement, provided that where records are not conclusive or are missing, the Seniority Board may use whatever

means it deems necessary to supplement such records.

“(f) The Seniority Board shall convene within sixty (60) days after the signing of this Agreement and compile a Seniority List on which shall appear the names of employees Active or Inactive, entitled to seniority. The completed Seniority List shall be posted on all bulletin boards where Flight Radio Officers are based.

“(g) An employee shall be privileged to protect his position on the Seniority List provided that such protest is in writing outlining the reasons therefor and is made to the Seniority Board within sixty (60) days after the Seniority List is posted, and provided further that such protests do not conflict with any provisions of this Agreement.

“(h) Within sixty (60) days after the time period to file protest with the Board has ended the Seniority Board will convene, if necessary, and shall make all determinations of questions contained in seniority protests.

“(i) The determination of the Board relating to Seniority protests shall be final and binding on the employee and the Company.”

4. That it is true that after the execution of said agreement dated the 17th day of April, 1946, the defendant proposed to the System Seniority Board, therein established, names of the employees affected and data for the determination of the senior-

ity rank or status of each; and that included upon the list so proposed by defendant were the names of each of the plaintiffs.

5. That it is true that on the 26th day of June, 1946, the defendant and said Flight Radio Officers Association found that they were unable to agree upon the terms of a collective bargaining agreement then being negotiated between them; that upon said date they applied to the National Mediation Board for mediation services, as provided in said Railway Labor Act; that said National Mediation Board accepted said matter as N.M.B. case number A2381, and proceeded to act as provided in said Railway Labor Act; that on or about October 28, 1946, in the presence of a representative of said National Mediation Board, said parties reached an agreement; and that on or about the 4th day of November, 1946, said matter was ordered closed and terminated by said National Mediation Board.

6. That it is true that said agreement dated the 28th day of October, 1946, between the defendant and the Flight Radio Officers Association, as mediated by and executed in the presence of said National Mediation Board, governed the hours of work, wages and other working conditions of flight radio officers and flight radio officer trainees in the defendant's employ; that as respects seniority said agreement confirmed and adopted said agreement dated the 17th day of April, 1946; and that within thirty (30) days after the execution of said agreement dated the 28th day of October, 1946, the de-

fendant filed the same with the National Mediation Board, as required by said Railway Labor Act.

7. That it is true that on the 19th day of November, 1946, the said System Seniority Board issued the initial seniority list for flight radio officers in the employ of defendant; and that the names of none of the plaintiffs appeared thereon.

8. That it is true that said Flight Radio Officers Association thereafter affiliated with and became a part of the Transport Workers Union of America (CIO), which thereafter furnished evidence that it continued to be duly designated as the representative of the flight radio officers and flight radio officer trainees employed by the defendant; that on the 6th day of February, 1948, the defendant and the said Transport Workers Union of America (CIO) entered into an agreement, superseding the said agreement dated the 28th day of October, 1946, governing the hours of work, wages and other working conditions of flight radio officers and flight radio officer trainees in the employ of defendant.

9. That it is true that said agreement dated the 6th day of February, 1948, provided in Article 9 thereof as follows:

“(a) Seniority hereunder shall be determined by the Flight Radio Officers’ System Seniority List of Pan American Airways, Inc., dated April 11, 1947, and as hereafter adjusted in accordance with the provisions of this Agreement.

“(b) A Seniority Board consisting of two members designated by the Union and two members designated by the Company shall meet twice each year for the purpose of adding and removing names, to act upon protests and to make such adjustments in the Flight Radio Officer System Seniority List as may be necessary and proper under this Agreement.

“(c) A new Flight Radio Officer hereunder shall accrue seniority from the date of departure on a productive flight; that is, a flight on which he is assigned not solely for his own training. When two or more employees depart on their first productive flight on the same date, their relative seniority standing shall be determined by lottery.

“(d) When the Seniority Board has completed the adjusted Flight Radio Officer System Seniority List, it shall cause to be posted copies of the List of all Fields where employees hereunder are based, and employees shall have the right to protest inaccuracies or omissions within sixty (60) days from the date of posting. A protest, other than typographical error, shall not be valid if the above Seniority Board has once acted on it.”

10. That it is true that within thirty (30) days after the execution of said agreement dated the 6th day of February, 1948, the defendant filed the same with the National Mediation Board, as required by law.

11. That it is true that the name of none of the

plaintiffs appears upon the said Flight Radio Officers' System Seniority List; that the said System Seniority Board caused said list to be posted as required by said agreements herein above set forth; that none of the plaintiffs protested or attempted to protest the omission of his name therefrom, either as required by said agreements or otherwise.

12. That it is true that the defendant is prevented by law, to wit, by said agreement dated the 6th day of February, 1948, as executed in the presence of and duly filed with the National Mediation Board, from employing any of the plaintiffs as a flight radio officer.

13. That it is true that even if each of the plaintiffs had been placed upon said System Seniority List, under an interpretation of said agreements and said list most favorable to said plaintiffs, none of the plaintiffs would have sufficient accrued seniority thereunder to have made him eligible for reinstatement to a position as flight radio officer in the defendant's employ on November 15, 1948, or at any time thereafter, since there are men with greater accrued seniority than any plaintiff might have who have been and are on "laid-off status," that is, seeking reinstatement with the defendant as flight radio officers but unable to obtain the same because of lack of available positions.

14. That it is true that said agreement dated the 6th day of February, 1948, provided that the same should continue in full force and effect until the 1st day of April, 1949; that shortly prior to the 1st day

of April, 1949, the parties thereto, being unable to agree upon an extension of said agreement, filed an application for mediation with the National Mediation Board, under the provisions of said Railway Labor Act, the said proceeding being designated as Docket Case A-3102; that on the 2nd day of April, 1949, in the presence of a mediator of said National Mediation Board, and under the seal of said board, a memorandum of agreement was signed and accepted by said parties continuing in effect the terms hereinabove mentioned of said agreement dated the 6th day of February, 1948, governing the employment of flight radio officers by said defendant; and that said memorandum of agreement dated the 2d day of April, 1949, further provided that such flight radio officers whose employment with the defendant thereafter was severed, by other than discharge or resignation should be conclusively presumed to have been severed due to the advent of radiotelephone, as a method of communication to and from aircraft operated by the said defendant, and that such employees so severed should receive from the defendant a severance allowance of \$3,000 at the rate of \$600 per month, or if they accept other employment with the defendant, a severance allowance of \$3,000 less \$600 for each year of such other employment.

Findings on Third Separate Answer

Upon the third separate answer of defendant, the court finds:

1. That it is true that the defendant has offered

to each of the plaintiffs employment in the communications department of defendant at a grade commensurate with the length of service of each said plaintiff; and that each said plaintiff refused and declined to accept said offers when made.

Findings of Fourth Separate Answer

Upon the fourth separate answer of defendant the court finds:

1. The court incorporates by reference paragraphs 2, 4, 5 and 6 of its findings on the first separate answer above set forth.

2. That it is true that on the 14th day of July, 1948, said Transport Workers Union of America (CIO,) acting for and on behalf of the plaintiffs and others, entered into an agreement with the defendant, which said agreement submitted to a board of arbitration for decision the question of what rights of seniority or right of retention of employment, if any, the plaintiffs and others might have as against the defendant.

3. That it is true that on the 10th day of November, 1948, said board of arbitration rendered its award, which stated in paragraph 1 as follows:

“1. It is the decision and award of this Board of Arbitration that Pan American Airways, Inc., shall not be required to retain the professional navigators in its employ, except for work in accordance with the established practice as ground instructors in navigation.

At the discretion of the Company they may be used as navigation instructors in flight.”

That it is true that said award provided further in paragraphs 3, 4 and 5 thereof as follows:

“3. Upon dismissal each of the professional navigators employed by the Company will be given as severance pay the sum of \$2,000 which will include the amount that would be payable under Article 18(f) of the parties’ agreement of December 31, 1946; they will also receive payment for vacation earned or accrued but not taken and refunds due under the Company insurance and retirement plans.

“4. Provisions of the agreement of the parties on seniority and related matters inconsistent with this award are deemed superseded or amended accordingly.

“5. The provisions of this award shall become effective as of the close of business on November 15, 1948.”

4. That it is true that on the 15th day of November, 1949, the services of each of the plaintiffs were terminated by the defendant, and that each of said plaintiffs was then paid by defendant the sum of \$2,000 as severance pay, plus payment for vacation earned or accrued but not taken and refunds due under the defendant’s insurance and retirement plans.

From the foregoing facts, the court concludes:

Conclusions of Law

1. That defendant Pan American World Airways, Inc., is entitled to judgment against the plaintiffs, and each of them.

2. That each of the parties shall bear its own costs.

Let judgment be entered accordingly.

Dated this 16th day of May, 1950.

/s/ MICHAEL J. ROCHE,
District Judge.

Receipt of Copy Acknowledged.

Lodged May 11, 1950.

[Endorsed]: Filed May 18, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 28639H

AUBREY L. CHARMAN, STANLEY CUM-
MINGS, JOHN A. HRUTKY and JOHN F.
SCHWELLA,

Plaintiffs,

vs.

PAN AMERICAN AIRWAYS, INC., a corpora-
tion, FIRST DOE, SECOND DOE and
THIRD DOE, a corporation,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial on April 27 and 28 and May 3, 1950, before the court sitting without a jury, a jury having been expressly waived, Gladstein, Andersen, Resner & Sawyer and Norman Leonard appearing as counsel for plaintiffs, and Athearn, Chandler, Hoffman & Angell, Fred G. Athearn, Leigh Athearn, Hugh Knowlton, Jr., and Charles F. Hamlin appearing as counsel for defendant Pan American World Airways, Inc., (sued herein as Pan American Airways, Inc.), and the court having heard the testimony and having examined the proofs offered by the respective parties, and the court being fully advised in the premises and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now,

therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That defendant Pan American World Airways, Inc., is hereby given judgment against the plaintiffs, and each of them.

2. That each of the parties shall bear its own costs.

Dated this 16th day of May, 1950.

/s/ MICHAEL J. ROCHE,
District Judge.

Entered in Civil Docket May 19, 1950.

Lodged May 11, 1950.

[Endorsed]: Filed May 18, 1950.

[Title of District Court and Cause,]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

Please take notice that the plaintiffs and each of them appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on May 19, 1950, and from the whole of said judgment.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ NORMAN LEONARD,
Attorneys for Plaintiffs.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 22, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 28639

Before: Hon. Michael J. Roche,
Judge.

AUBREY L. CHARMAN, STANLEY CUM-
MINGS, JOHN A. HRUTKY and JOHN F.
SCHWELLA,

Plaintiffs,

vs.

PAN AMERICAN AIRWAYS, INC., a corpora-
tion, FIRST DOE, SECOND DOE and
THIRD DOE, a corporation,

Defendants.

REPORTER'S TRANSCRIPT

Thursday, April 27, 1950

Appearances:

For the Plaintiffs,

NORMAN LEONARD, ESQ.

For the Defendants,

LEIGH ATHEARN, ESQ.,

F. G. ATHEARN, ESQ.,

HUGH KNOWLTON, ESQ.,

CHARLES HAMLIN, ESQ.

AUBREY L. CHARMAN

Plaintiff herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Leonard: [2*]

The Clerk: State your full name, please?

A. Aubrey Lanhour Charman.

The Court: Where do you reside?

A: I reside at Lodi, California.

The Court: And your business or occupation?

A. My business is operation of a launderette.

The Court: At the present time?

A. Yes, sir.

The Court: All right, proceed.

Q. (By Mr. Leonard): What is your age, Mr. Charman? A. Forty.

Q. What formal education did you have, Mr. Charman?

A. My formal education was grammar school and specialized courses in radio and meteorology.

Q. Where did you go to grammar school?

A. Southern California.

Q. When did you enter into your first specialized course in radio? A. 1925.

Q. Where?

A. The National Radio School in Los Angeles.

Q. How long a course was that?

A. Two years.

* Page numbering appearing at top of page of original certified Reporter's Transcript.

(Testimony of Aubrey L. Charman.)

Q. Just state briefly what the nature of the course was and what you learned.

A. Radio: The theory, practice, operation of radio transmitters and receivers, and the operation and practical use on radio networks.

Q. At the conclusion of that two year course did you obtain employment or did you have any further studies?

A. I obtained employment and furthered my studies thereafter to increase the grade of license.

Q. What employment did you obtain?

A. Radio operator aboard ships at sea.

Q. At what companies did you work and on what ships did you work?

A. On a French ship at first, the *Compania Durdoleo*, a French company; then transferred to *Socony Vacuum*, *Sun Oil Company*, *Matson Navigation Company*, and finished my sea-going career as Chief Operator aboard the *Lurline*.

Q. All the employment you had on these various ships was in what capacity?

A. Radio operator. [4]

Q. Did you obtain any licenses, or what are commonly called tickets, as a radio operator?

A. When I first went to sea I had to have a second class telegrapher's license, that I obtained through an examination at the Federal Trade Commission.

Q. Did you thereafter obtain another license?

A. After studying and a year's time at sea I

(Testimony of Aubrey L. Charman.)

took an examination at the Federal Communications Commission for the first class license.

Q. What kind of study did you have reference to?

A. Further study of the radio. The first class license—first class radio examination is much stiffer than the second class.

Q. For how long did you work for the Matson Navigation Company? A. Three years.

Q. On what ships did you work?

A. Lurline and Monterey.

Q. In what capacity?

A. As second and chief radio man.

Q. And ended with, I think you said, ended your sea-going career as Chief Radio Operator? [5]

A. With Matson, yes.

Q. Aboard what ship? A. The Lurline.

Q. What was your next employment or education after you left the Lurline?

A. My next employment was with Pan-American Airways.

Q. When were you first employed by Pan-American Airways? A. October 8th, I believe, 1935.

Q. In what capacity were you so employed?

A. Assistant Radio Operator.

Q. In connection with that work was it necessary, or prior to the time you undertook that work, I should say, was it necessary for you to undertake any studies to prepare yourself for that duty?

A. For that specific duty?

Q. For that duty?

(Testimony of Aubrey L. Charman.)

A. Not for that duty, no.

Q. And approximately—Withdraw that. What were your duties as an Assistant Radio Operator?

A. The operation of the radio circuit, sending and receiving of messages; doing the ground control of the airplane—ground control of the radio circuit, whether it be airplane; [6] take radio bearings for the airplanes, primarily, while they are in flight—while they are at sea on the flight.

Q. Where were you stationed when you performed that duty?

A. Alameda, Honolulu, Wake Island and New Zealand.

Q. How long did you remain an Assistant Radio Operator?

A. I believe it was—when I went to Wake Island, that was in the latter part of 1936. I went to Wake Island as Chief Operator at Wake.

Q. Mr. Charman, I show you a carbon copy of a letter dated November 15, 1948, the original of which was apparently signed by Wyatt F. Fisher. I have shown this to counsel and he has no objection to your using it——[7]

* * *

Q. (By Mr. Leonard): After your duty as Assistant Radio Operator which you have described, and refreshing your recollection from the memoranda prepared by the defendant which you have in your hand there, will you state what your next duty was and when you were assigned to it?

A. The next was Wake Island on, I believe, the

(Testimony of Aubrey L. Charman.)

latter part of 1936, as Chief Operator. Then I was returned to Honolulu as an Assistant Operator for a period of six months. I was on Wake Island six months. Then I was sent to New Zealand to establish a new radio station, to operate and maintain the present station that was there and to establish a new one preparatory to Pan-American Airway's new airline to New Zealand.

Q. And during that period of time what was your classification?

A. During that period of time my classification varied between Assistant Radio Operator and Chief Radio Operator.

Q. Let me see that for a moment. When did you become a Flight [8] Radio Officer?

A. The latter part of 1938.

Q. This personnel memorandum indicates you were classified Flight Radio Officer on October 1st, 1938. Would that be substantially correct?

A. I was going to say October when I decided not to. I wasn't sure.

Q. During the time you were a radio operator as distinguished from F.R.O., what salary or salaries were you receiving?

A. I started at \$125.00 and when I transferred it was \$200.00 a month.

Q. As Radio Operator or Assistant Radio Operator or Chief Radio Operator your duties were confined to nonflying duties, is that correct?

A. That is correct.

(Testimony of Aubrey L. Charman.)

Q. In October, 1938, you became a Flight Radio Officer? A. That is right.

Q. Will you explain the duties of that position?

A. A Flight Radio Officer's job consists of operating and when possible maintaining the equipment aboard the aircraft, the sending and receiving of messages relative to the location of the airplane on the ocean or over the ocean; weather reports' radio bearings, and any other telegraphic messages necessary.

Q. In other words, as Flight Radio Officer you actually [9] performed the duties aboard the aircraft in flight? A. That is true.

The Court: That began when? 1938?

A. October 1st, 1938.

Q. (By Mr. Leonard): What was your salary as Flight Radio Officer?

A. I think I started at \$250.00 a month.

Q. Did you receive any increases until your next transfer?

A. Yes, I received regular increases.

Q. Do you know what it was when you terminated as a Flight Radio Officer?

A. No, I don't know.

Q. You don't recall? All right. Now, thereafter, at sometime thereafter, you became what has been described as a Nonpilot Navigator, is that right? A. Yes.

Q. According to Mr. Fisher's memorandum, January 1st, 1941, would that be the correct date?

A. Yes.

(Testimony of Aubrey L. Charman.)

Q. Will you state, Mr. Charman, the circumstances surrounding your transfer from a Flight Radio Officer to a Nonpilot Navigator?

A. Somewhat in detail?

Q. Yes. [10]

* * *

A. Mr. Thurston Ramsey—I believe he was assistant to the General Manager of the Pacific Division in the latter part of 1940, December, 1940—approached me after He approached Mr. Angus, who was the Communications Superintendent for the Pacific Division. [11]

* * *

Q. (By Mr. Leonard): Mr. Charman, you have already testified that on January 1st, 1940, you transferred from the Communications Department where you were Flight Radio Officer to the Navigation Department. Is that what it was called?

A. That is true.

Q. Shortly after your transfer did you receive a written [12] memorandum in connection with that transfer? A. I did.

Q. I show you a document dated January 21, 1941, which appears to be addressed to one of the other plaintiffs in this case, Mr. Hrutky, and ask you if you received a document identical in form to that one? A. I did.

Q. At the present time you have either misplaced or lost the one you received, is that correct?

A. Yes.

(Testimony of Aubrey L. Charman.)

Mr. Athearn: We will be happy to furnish you a copy of it, counsel.

Mr. Leonard: Well, if we can stipulate——

Mr. Athearn: They were all uniform.

Mr. Leonard: I should like to offer, if the court please, the document and ask permission to withdraw the original and substitute a photostatic copy therefor.

The Court: It may be.

Mr. Athearn: Now, Your Honor, at this time we will make objection to the offer on the basis it is our contention that this is only a statement of intention and not a written contract; that it is like my promising people anything—I [13] promise Mr. Leonard I will buy him a lunch; if I don't, he can't proceed and sue even though I wrote it in a letter. I think it were better if this were offered for identification and we argue later about admissibility.

The Court: Suppose it goes in subject to motion to strike and over the objection?

Mr. Athearn: All right. I think there will be other memoranda, and if we can have the same motion to strike with reference to them?

The Court: Very well.

(Thereupon, letter dated Jan. 21, 1941, addressed to Mr. J. A. Hrutky, signed by G. W. Angus and J. C. Leslie, was admitted into evidence as Plaintiff's Exhibit 1.)

Q. (By Mr. Leonard): For the record, so that it may be complete, I notice that this document

(Testimony of Aubrey L. Charman.)

which has just been admitted in evidence as Plaintiff's Exhibit 1, bears two signatures; that of G. W. Angus and J. C. Leslie. Will you tell us who G. W. Angus was in January, 1941?

A. He was the Communications Superintendent for the Pacific Division of the company.

Q. Will you state whether or not he was your superior [14] officer in the Communications Department? A. Yes, sir.

Q. Who was J. C. Leslie?

A. J. C. Leslie, if my title is correct, was the general manager of the Pacific Division.

Q. What was his relationship to you in your capacity as an employee of the company?

A. Well, no different from any other General Manager's relationship would be with any employee.

Q. Will you state, Mr. Charman, what led up to your receipt of the communication which is Plaintiff's Exhibit 1 in evidence?

A. Well, Mr. Ramsey, Thurston Ramsey, who I said I believe was assistant to Mr. Leslie, approached me requesting I take on the duties of Navigator because they were running short on pilots and needed pilots for piloting rather than navigating. They chose me as being one of their senior men in the communications groups. We had taken navigation, a correspondence course in navigation put out by the company.

Q. When did you engage in that course?

A. I don't know except that I was a Flight Radio Officer at the time.

(Testimony of Aubrey L. Charman.)

Q. While you were a Flight Radio Officer you took a [15] correspondence course in navigation put out by the company? A. Yes, sir.

Q. Did you complete that course?

A. Yes, sir.

Q. All right, proceed.

A. Mr. Ramsey suggested I take on the job of Navigator, and if I would fulfill the requirements of the position they would then take some more radio men off the seniority list, top of the list, and make navigators of them. My first answer was, "Well, I don't know." In other words, "What's it worth to me?" His statement at the time was that if anything should ever go wrong with that work, they would go back to their Pilot-Navigators, we would then revert to our communications jobs; and I requested Mr. Ramsey to put it in writing, and he said, "I can't. Mr. Leslie will."

Mr. Angus, the Superintendent, then called me to the office and asked me what my answer was and I said, "On Mr. Ramsey's recommendation that Mr. Leslie will write a letter referring to the fact that I will come back to Communications I will accept the request that I take on Navigation duties."

Q. Thereafter you received the document?

A. That is true. [16]

Q. And you did assume duties as a Navigator, is that correct? A. Yes, sir.

Q. Will you state how long that course took?

A. That course took a period of approximately

(Testimony of Aubrey L. Charman.)

five months or six months, consisting of classroom time and actual time in the airplane navigating under a pilot-navigator as instructor.

Q. Where did you study? Where did this course of study take place? A. On Treasure Island.

Q. You were transferred from the Communications Department to Navigation, and was there any change in your salary?

A. Yes, I believe I got a \$25.00 increase in pay.

The Court: What was the pay at that time?

A. I believe it was \$275.00. I am not sure. I don't know.

Q. (By Mr. Leonard): After the—Strike that. Did the training period encompass any trips outside of the continental United States?

A. We made three flights to Hong Kong as a check-out. The way they performed our training, we had to undertake certain studies along certain lines of navigation. As an instance, the first one was dead reckoning and we made a trip to [17] Hong Kong and back solely on dead reckoning.

The Court: What do you mean by dead reckoning?

A. Dead reckoning is the assuming of your position on any part of the ocean by drift, the way the wind is blowing you, by ground speed and by air speed. In other words, there is no celestial navigation used at all.

After that trip we had further studies combining celestial and radio navigation, and then we had a

(Testimony of Aubrey L. Charman.)

trip using the combination of celestial and radio navigation, just using the sun and the moon in celestial navigation. On our third trip we had everything, and that was our check-out trip. If we got through that all right we were on our own.

Q. (By Mr. Leonard): When did you finally complete that course of study you have described and finally go out on your own?

A. I think it was June 21st, 1941.

Q. Thereafter, did you continue in the employ of the company as a Navigator? A. Yes, sir.

Q. And did you about two years later, or sometime in April, 1943, receive another communication from the company in connection with the matters we are concerned with here? A. Yes. [18]

Q. I show you this multigraphed document dated April 23, 1943—April 22nd, excuse me, 1943, and ask you if that is the document you received at or about that time? A. Yes, sir.

Q. For the record, I notice it is signed J. H. Tilton and H. O. Gentry. Will you state who they are?

A. Mr. Angus, the Chief of Communications, for the Pacific Coast, died in an airplane crash and Mr. Gentry replaced him; and Mr. Tilton replaced Mr. Leslie, the Operations Manager.

Q. In other words, the gentlemen who signed the documents in 1943 were successors of the gentlemen who signed the document in 1941? A. Yes.

(Testimony of Aubrey L. Charman.)

Mr. Leonard: We offer this in evidence, if Your Honor please, as plaintiffs' exhibit next in order.

The Court: It may be admitted and marked.

Mr. Athearn: Subject to the motion to strike previously made?

The Court: Subject to the motion to strike previously made and over the objection of counsel.

(Thereupon, Memorandum from Pan American Airways System dated April 22, 1943, was admitted in evidence as Plaintiffs' Exhibit 2.)

Q. (By Mr. Leonard): After the receipt of the communication that has been marked in evidence did you continue your duties as a Navigator for the company? A. Yes, sir.

Q. Did you from time to time receive any pay increases? A. Yes, sir.

Q. And what was the maximum salary that you earned in your position as Navigator?

A. The maximum salary I earned was \$600.00 a month.

The Court: What was it?

A. \$600.00.

Q. (By Mr. Leonard): Was it that or was it \$625.00?

A. There were three or four so-called "check navigators" chosen by the Chief Navigator and they, I believe, received an extra \$25.00 a month compensation.

Q. But you were not one of them?

(Testimony of Aubrey L. Charman.)

A. I wasn't one of them.

Q. Your employment as navigator terminated when, Mr. Charman?

A. November 15, 1948. 15th or 30th, I don't know which it was. I guess we got our telegram on the 15th.

Q. Of November? A. Yes. [20]

Q. Of 1948? A. Yes.

Q. Thereafter did you——

The Court: Just a moment. What occurred at that time?

A. The termination of my employment with Pan American.

Q. (By Mr. Leonard): Thereafter did you send any written communication to the company requesting that you be reinstated in the Communications Department? A. Yes, sir.

Mr. Leonard: Mr. Athearn, I wonder if you have the original of such communication?

Mr. Athearn: No, but I think I have a copy here, though.

Mr. Leonard: If you have it, I would appreciate it.

Mr. Athearn: I will get it during the noon hour.

Q. (By Mr. Leonard): You did send a written communication, a copy of which Mr. Athearn says he will produce, to the company in which you requested you be assigned to duty in the Communications Department? A. That is right.

(Testimony of Aubrey L. Charman.)

Q. Did you receive a response from the company?

A. I received a response.

Q. Did the response grant your request or did it deny that request? [21]

A. No, sir, it denied it.

Q. Have you since November, 1948, been employed by the company in its Communications Department? A. No, sir.

Q. Have you been employed by the company at all? A. No, sir.

Q. So that it is also true—I just ask this for the record—that since November, 1948, you have not resumed your duties as Flight Radio Officer with no loss of seniority? A. No, sir.

Q. It is also true, and I ask this for the record, that since——

Mr. Athearn: Mr. Charman has already testified he wasn't working for the company, and we have stipulated to that.

Mr. Leonard: Well I would like to tie that in, if I may, to the documents which are in evidence.

The Court: Terminated employment in 1948? What month was it?

A. November.

Q. (By Mr. Leonard): It is also true you have not been re-established in the Communications Department in a grade commensurate with the length of time—— [22]

Mr. Athearn: This is argumentative. He has just stated he wasn't working for the company.

(Testimony of Aubrey L. Charman.)

The Court: Very well.

Q. (By Mr. Leonard): All right, what have you done, Mr. Charman, since November, 1948?

A. I tried the insurance business and found that extremely rugged, shall we say.

Q. Incidentally, do you have a family?

A. Yes, I have.

Q. What does it consist of?

A. Wife and two little girls.

Q. What earning or earnings have you had since November, 1948?

A. I think my Federal income tax for—on the income tax report for 1949 was around \$600.00.

Q. This is in the insurance business?

A. Yes.

Q. The agency which you tried to establish was at Lodi? A. Yes.

Q. Did you make any effort to get employment after November, 1948, with any other air lines?

A. Yes, sir. [23]

Q. With what airlines and with what success?

A. United Airlines and Northwest Airlines, with no success.

Q. Were any reasons given you as to why—Withdraw that. For what positions did you apply with United or Northwest?

A. Radio or Navigator.

Q. What reasons were given you?

A. Age limit. 33 was the age limit they would accept new men.

(Testimony of Aubrey L. Charman.)

Q. I think you testified you are now 40?

A. That is right.

Mr. Leonard: I believe that is all.

Cross-Examination

By Mr. Athearn:

Q. I think you stated, Mr. Charman, that it was Thurston Ramsey who first approached you about becoming a Nonpilot Navigator?

A. That is true.

Q. He was one of your superiors at the time?

A. He was in the Operations Department. He wasn't my direct superior. My direct superior was in the Communications Department and he was responsible to the Operations Department.

Q. Can you tell us about when that was he approached you? [24]

A. Latter part of December, 1940.

Q. Latter part of December, in December, 1940?

A. Yes.

Q. And it was January 1st, 1941, that you became a Non-Pilot Navigator, was it not?

A. That is true.

Q. Then this approach by Mr. Ramsey would have been a week or two before that, is that correct?

A. I would say so, yes.

Q. Before that time had you had any discussion with anyone about becoming a Non-Pilot Navigator?

A. Not that I recall.

(Testimony of Aubrey L. Charman.)

Q. Did you request to become a non-Pilot Navigator prior to that time?

A. Not that I recall.

Q. Then this approach by Mr. Ramsey was the first time you had ever heard about the possibility of getting this job as a Non-Pilot Navigator, is that it? A. Honestly, so far as I know.

Q. I realize it has been a long time. I am not trying to force your memory. Ten years is a long time, but your best recollection is that in the latter part of December, 1940, [25] Mr. Ramsey approached you about this matter? A. Yes.

Q. And you don't recall having discussed the matter or had anything to do with such matter before that time? A. No, sir.

Q. Then as I understand it your conversation with Mr. Ramsey made you pause, but you wanted to talk to another gentleman. Was that Mr. Angus or Mr. Leslie?

A. No, no. I wanted—I discussed with Mr. Ramsey and negotiated with Mr. Ramsey provided Mr. Angus said all right. Mr. Angus was my direct superior at the time.

Q. Then you went to Mr. Angus' office, did you, I think you said? A. That is right.

Q. You still hadn't made up your mind to apply for this transfer at that time?

A. No. I had agreed with Mr. Ramsey provided Mr. Angus said all right it would be all right with me.

Q. In other words, if the head of your present

(Testimony of Aubrey L. Charman.)

department, the Communications Department would release you, you would take Mr. Ramsey's offer?

A. That is true, yes, sir. [26]

Q. And there would be that qualification, that something had to be in writing?

A. I wanted information, preferably in writing, as to what would happen should I lose my navigation job for any reason whatsoever.

Q. Of whom did you ask that information?

A. Mr. Ramsey.

Q. What did he say?

A. He said he would ask Mr. Leslie to write letters.

Q. I see. And the letter that you mentioned is the one in January of 1941, which is plaintiffs exhibit 1?

A. Yes, sir.

Q. I show you now a document captioned "Pan American Airways System," dated November 5, 1941, and bearing the name Aubrey L. Charman, and ask you if you recall that document?

Mr. Leonard: Is that an original?

Mr. Leigh Athearn: Yes, it is.

A. That is my writing.

Q. That is your signature?

A. But I don't recall it.

Q. It says, "November 5, 1941" and is addressed to the Communications Superintendent, is that correct?

A. Yes. That would be Mr. Angus, yes.

Q. It says, "In line with the proposed transferring of Flight Radio Officers to Navigators, please consider this letter [27] as my application for same.

(Testimony of Aubrey L. Charman.)

Signed, Aubrey L. Charman." That is your signature on there? A. That is true.

Q. With this to refresh your recollection, do you want to say anything more about previous dealings with this transfer? I realize memories are bad, Mr. Charman.

A. No, it doesn't refresh my memory any except that it went on back further than December, 1940.

Q. Isn't it a fact that you were anxious to get this transfer?

A. It meant \$25 more a month to me, yes.

Q. And you heard on the grapevine such a move was impending, did you not?

A. Apparently so, yes, sir.

Q. And you rushed right out and wrote a memorandum about it? In other words, you took the first step to initiate the transfer, didn't you?

A. I wouldn't say so, no. Mr. Angus, or Mr. Thurston Ramsey then approached me before December, if that is dated December 5th.

Q. I see. And you believe your conversations with Mr. Ramsey and Mr. Angus were prior to this memorandum?

A. That is right, and I had to write an official request for it.

Q. I see.

A. Mr. Ramsey came to the top floor of the communications, and [28] talked to me outside Mr. Angus' office. He had just come from Mr. Angus' office. Then I went right in to Mr. Angus.

(Testimony of Aubrey L. Charman.)

Q. At the time this November 5th document was executed, had you at that time said you would accept it only if certain reemployment rights were put in writing? A. I would judge so, yes.

Q. Are you sure of that now?

A. No, I am not.

Q. Then you requested this, put this application in, without any knowledge about reemployment rights?

A. Oh, boy, for a good memory. I don't think I would have without it. I had too much to lose.

The Court: What is that answer?

A. I don't think I would have put that request in without some reemployment rights. I had too much to lose.

Q. (By Mr. Athearn): You are only guessing what you might have done? You apparently have no memory about the matter?

A. That is right.

Mr. Athearn: We will ask that this be defendant's first exhibit.

The Court: Let it be admitted and marked.

(Memorandum dated November 5, 1940, Charman to Communications Superintendent, was received in evidence as Defendant's Exhibit A.)

Q. (By Mr. Athearn): After you were given this job as Non-Pilot [29] Navigator, and on or about October 27, 1944, did you join the Pan American Navigators Association? A. I did.

Mr. Leonard: Objected to, and move to strike

(Testimony of Aubrey L. Charman.)

on the ground it is incompetent, irrelevant and immaterial whether he joined any Association.

Mr. Athearn: Your Honor, we are going to show he not only joined the Association, but he authorized it to enter into a contract on his behalf. It is relative to one of our separate defenses.

Mr. Leonard: I submit it isn't material at all whether he joined an association of navigators to execute some collective bargainings.

The Court: Objection overruled. It may or may not be material. I will give him a record on it.

Mr. Leonard: May it be subject to a motion to strike?

The Court: Yes.

Mr. Leonard: Thank you.

Q. (By Mr. Athearn): Did you join the Association? A. I did.

Q. What kind of an organization was that?

A. It was an organization of navigators for the promotion of rights of the navigators.

Mr. Leonard: May it be understood, without constant interruption, that the motion goes to the entire line of testimony? [30]

The Court: It may so show.

Q. (By Mr. Athearn): The Association later affiliated with the Transport Workers Union, C.I.O.?

A. True.

Q. Did you continue to be a member after it changed its affiliation? A. I did.

Q. On or about October 27, 1944, did you execute and deliver to the Pan American Airways

(Testimony of Aubrey L. Charman.)

Navigators Association an authorization card reading as follows:

“I hereby agree that the Board of Directors of Pan American Airways Navigators Association shall represent me in the negotiation of a contract with Pan American Airways concerning wages and working conditions. I further agree that the said Board of Directors or any agent or agents appointed by the Board shall have full authority to come to any agreement which they consider just and reasonable.”

Mr. Leonard: If the Court please, in addition to the objection heretofore made I have the further objection to that general question on the ground that the provision of the Railway Labor Act, to which counsel makes reference in connection with the other defense, protects the secrets of trade union membership; and that counsel in this case and no other case has a right to inquire into the internal operations of the union and the kind of authorization men give the union, aside from the [31] fact that it is totally immaterial to this cause of action. It is a violation of the law, the Railway Labor Act, for counsel to inquire into that.

Mr. Athearn: I submit it would be a violation of the Railway Labor Act for us to deal with this organization unless a majority of the membership had executed it.

The Court: Objection overruled.

Q. (By Mr. Athearn): Did you sign such an authorization card?

(Testimony of Aubrey L. Charman.)

A. As a navigator, yes.

Q. And delivered it to the Association?

A. Yes. True.

Q. Were you aware that on or about January 4, 1945, the Pan American Airways Navigators Association, on behalf of yourself and others, executed an agreement with the defendant covering wages, hours, working conditions, seniority and reinstatement rights? A. True.

Q. Did you ever repudiate that agreement?

Mr. Leonard: That is objected to, Your Honor, on the ground it is immaterial.

The Court: Objection overruled. You may answer.

A. No.

Q. (By Mr. Athearn): You never told anyone you didn't want that agreement to be made for you?

A. No. As a navigator? No. [32]

Q. Did you ever file a protest with the Flight Radio Officers Seniority Board regarding the omission of your name from the Flight Radio Officers in the seniority list which was issued November 16, 1946?

A. I was—no, I was never informed my name was omitted from the list.

Q. Did you file a protest about it?

A. No.

Q. In your complaint you have alleged you have lost wages in the sum of \$150,000 on account of the defendant's failure to reemploy you. Can you tell me how that amount was calculated?

(Testimony of Aubrey L. Charman.)

Mr. Leonard: Objected to, if Your Honor please, as a misstatement of the complaint. He didn't allege he lost wages in the sum of \$150,000. He alleges he was damaged in that sum by reason of the breach of contract.

Mr. Athearn: Let's read the complaint, counsel. Reading from paragraph XIV of your complaint at the bottom of page 5:

"That by reason of defendants' breach of the agreements as aforesaid, said plaintiff has suffered damages in the amount of \$150,000 in lost wages."

Mr. Athearn: You are aware that is in the allegations of your complaint? A. True.

Q. Well, can you tell me how the \$150,000 in lost wages was calculated? [33]

A. Calculated on my earnings, my approximate earnings in the company until the time of retirement age.

Q. That is assuming that is the total amount you would earn if you worked for the Pan American Airways until your retirement?

A. In round figures.

Q. And you believe you are entitled to that sum of money without doing any work?

Mr. Leonard: Just a minute. That is objected to, if Your Honor please. What he believes is immaterial. We have a legal question whether there is a breach of contract and what the damages are.

The Court: Well, I will try to apply the law to the facts as we develop them. What are the facts?

(Testimony of Aubrey L. Charman.)

Objection overruled. Read the question, Mr. Reporter, please.

(Question read by the reporter.)

A. Yes, sir.

Q. (By Mr. Athearn): In your complaint you have alleged that you would have severance privileges had you been reemployed, having a value of \$10,000. How did you arrive at that figure?

A. Please read that again.

The Court: Read the question, Mr. Reporter, please.

(Question read by the reporter.)

A. I do not recall. [34]

* * *

Mr. Athearn: Mr. Leonard, in the pre-trial order covers a series of exhibits to be offered by the defendant, and the order provided the genuineness and due execution but not materiality or legal effect of these would be admitted, and I wonder if you would mind if we put them all in in series, for identification, and let them be given numbers so I can ask about them from this witness?

Mr. Leonard: No, there is no objection. At the time they are offered in evidence, Your Honor, we will have certain legal objections to present.

Mr. Athearn: Then we will offer as defendants next in order an agreement dated January 4, 1945, between the defendant and the Pan American Navi-

(Testimony of Aubrey L. Charman.)

gators Association.

The Court: It may be admitted and marked.

(Agreement dated January 4, 1945, between the defendant and the Pan American Navigators Association was marked Defendants Exhibit B for identification.)

Mr. Athearn: We offer as our next exhibit, for identification, a memorandum dated December 20, 1944, captioned, "Training and Placement Program for Navigators." [35]

The Court: It may be admitted and marked.

(Thereupon the document above referred to dated December 20, 1944, was marked Defendants Exhibit C for identification.)

Mr. Ahearn: We offer next an agreement dated December 31, 1946, between the defendant and the Transport Workers Union of America, C.I.O.

Mr. Leonard: Which group is that for? Oh, navigators.

The Court: It may be admitted and marked next in order.

(Whereupon the agreement above referred to was marked Defendants Exhibit D for identification.)

Mr. Athearn: We offer next in order an agreement dated October 28, 1946, between the defendant and Flight Radio Officers Association, including an agreement dated April 16, 1946, appended thereto.

The Court: It may be admitted and marked.

(Testimony of Aubrey L. Charman.)

(Whereupon the agreement above referred to was marked Defendants Exhibit E for identification.)

Mr. Athearn: We offer next a memorandum dated April 2, 1949, in settlement of differences in Docket Case A-3102 of the National Mediation Board, including memorandum of agreement dated April 2, 1949, appended thereto.

The Court: It may be admitted and marked.

(Whereupon the memorandum above referred to dated April 2, 1949, was marked Defendants Exhibit F for identification.)

Mr. Athearn: We offer next an agreement dated February 6, [36] 1948, between the defendant and Transport Workers Union of America, C.I.O., including agreement dated January 12, 1948, and memorandum dated February 6, 1948, appended thereto.

The Court: It may be admitted and marked.

(Whereupon the agreement above referred to dated February 6, 1948, were marked Defendants Exhibit G for identification.)

Mr. Athearn: We offer next an award dated November 10, 1948, in the matter of an arbitration between the defendant and the Transport Workers Union of America, C.I.O.

The Court: It may be admitted and marked.

(Whereupon the award above referred to

(Testimony of Aubrey L. Charman.)

dated November 10, 1948, was marked Defendants' Exhibit H for identification.)

Mr. Athearn: Then we offer next four letters as a single exhibit, identical in nature, dated March 4, 1949, from the defendant to each of the plaintiffs. Is it all right to offer them as one exhibit?

The Court: You may. They may be marked next in order.

(Whereupon the four letters above referred to and dated March 4, 1949, were marked Defendants' Exhibit I for identification.)

Mr. Athearn: Next we offer a letter dated March 18—strike that—dated March 14, 1949, from Norman Leonard, Esq., to the defendant.

The Court: It may be marked next in order.

(Whereupon the letter dated March 11, 1949, above referred [37] to was marked Defendants Exhibit J for identification.)

Mr. Athearn: We next offer, finally, a letter dated March 18, 1949, from Leigh Athearn, Esq. to Messrs. Gladstein, Andersen, Resner and Sawyer.

The Court: It may be marked next in order.

(Whereupon the letter above referred to and dated March 18, 1949, was marked Defendants' Exhibit K for identification.)

Q. (By Mr. Athearn): Now, Mr. Charman, calling your attention to an agreement dated January 4, 1945, between the defendant and the Pan

(Testimony of Aubrey L. Charman.)

American Airways Navigators Association, which we are referring to here as Defendants Exhibit B for identification; and in particular calling for identification; and in particular calling your attention to Section 3-A thereof, I want to call your attention to this language:

“There shall be a system-wide—” excuse me, it is Section 3-C:

“In addition, the Company will exercise its best efforts to place Navigators in available positions for which they are qualified when the policy of using Pilot-Navigators is resumed. The method by which the Company will endeavor to make such assignments available to Navigators and the procedure for giving additional training to Navigators who have been selected will be that described in the memorandum on this subject dated December 20, 1944.”

Were you aware of that Section of the Navigators Agreement?

A. Yes. [38]

Mr. Leonard: Objected to, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial, and an inquiry of the witness with respect to a document which has been marked for identification and is not yet in evidence.

Mr. Athearn: This witness said he knew this was signed.

The Court: He has already answered “yes.”

Mr. Leonard: I understand that. He answered

(Testimony of Aubrey L. Charman.)

before I got my objection in so I move to strike it.

The Court: Motion denied. Objection overruled.

Q. (By Mr. Athearn): You were aware that was in the 1945 Navigator's Agreement?

A. Yes.

Q. Calling your attention to a memorandum dated December 20, 1944, captioned, "Training and Placement Program for Navigators," which we are referring to here as Defendants Exhibit C for identification, I call your attention to the first paragraph which reads:

"The Navigator group will face considerable curtailment when the Company resumes its policy to use Pilot-Navigators. Because of this problem and in order to retain in the Company, insofar as possible, the extensive flight experience gained by Navigators, the Company will exercise its best efforts to place Navigators in other available positions for which they are qualified in accordance with the following program." [39] Were you aware of the existence of this paragraph?

A. Yes. Not as concerned me.

Mr. Leonard: Your Honor, I move to strike the answer and I object to the question on the ground it is incompetent, irrelevant and immaterial, and an inquiry of the witness on a document which has not been received in evidence.

The Court: He can ask him the question directly. Objection overruled.

Q. (By Mr. Athearn): What was your answer?

(Testimony of Aubrey L. Charman.)

A. My answer was yes, but not concerned me.

Q. This is the memorandum which is referred to in the agreement referred to as Defendants Exhibit B, isn't it?

A. That is true. I had my contract with the Company. That was for the war-time hired navigators.

Q. Did you ever make any application in accordance with this memorandum for placement?

A. For replacement?

Q. Yes.

A. I believe they sent out a questionnaire requesting what position you desired in case the Navigators program was discontinued.

Q. When you say, they sent it out, you mean——

A. The Company.

Q. The defendant Company?

A. Yes. [40]

Q. What did you do about that?

A. I filled mine out and forwarded it to the Company.

Q. Did you follow that up in any way?

A. I beg your pardon?

Q. Did you take any—did you do anything further about that?

A. Nothing was offered me.

Q. You sent in your form, did you?

A. Yes, sir.

Q. And you never received a reply?

A. I had a talk.

Q. An interview?

(Testimony of Aubrey L. Charman.)

A. An interview, yes.

Q. What happened then? A. Nothing.

Q. Did you later inquire about the results of the interview or what was going to happen?

A. No, sir.

Q. Calling your attention to a memorandum dated April 2, 1949, in settlement of differences in Docket Case A-3102 of the National Mediation Board, which we refer to here as Defendants Exhibit F for identification, have you ever seen that memorandum, and the agreement appended to it?

A. How much time can I take to see this?

Q. Take your time. Generally, are you familiar with the fact that the agreement was entered into?

* * *

The Court: Do you know what this is?

A. No, I will have to read it through. Offhand, I don't know.

The Court: That is all right. There is no need to get nervous about it at all.

A. No, sir, I have never seen that before.

* * *

Q. (By Mr. Athearn): Calling your attention to paragraph 2 of an agreement between the defendant and the Transport Workers Union as representative of the Flight Radio Officers signed on April 2, 1949, this language:

“Employees severed by other than discharge or resignation shall be conclusively presumed to have

(Testimony of Aubrey L. Charman.)

been severed due to the advent of radio-telephone and shall receive \$3,000 at rate of \$600 per month."

Are you aware that such an agreement was entered into between the parties? [42]

Mr. Leonard: Objected to, if the Court please, on the ground no foundation has been laid. The witness testified he had never seen the document before. Furthermore, as Mr. Athearn just stated, the document is dated April, 1949, which is four months after the discharge of this witness, so that any agreement they made four months after the discharge of the witness couldn't affect his cause of action.

The Court: Objection overruled. He may answer if he knows.

Q. (By Mr. Athearn): Did you know any such agreement was entered into?

A. I was aware of such a thing by the grapevine.

Q. Do you know what the severance pay of Flight Radio Officers is now? A. \$3,000.

Q. If you had a job with the defendant right now as Flight Radio Officer, you would be entitled to \$3,000 severance pay?

A. If I was to leave, yes.

Q. I believe you said you were now operating a launderette, is that correct?

A. That is correct.

Q. Prior to that time you had an insurance business? A. That is right.

Q. How long has the launderette been operating?

(Testimony of Aubrey L. Charman.)

A. The launderette has been operating since January 10th.

Q. Of this year? [43] A. This year.

Q. Then what was your occupation or employment during 1949? A. Insurance agent.

Q. You gave us, I believe, some figures about your income tax during 1949. Would you repeat that?

A. My income tax form to the Government stated my income as being—exactly I can't tell you—around \$600 for the year 1949.

Q. Is that just for the insurance business?

A. That is just for the insurance business.

Q. What other income did it show you having?

A. None.

Q. So your total income was \$600?

A. That is correct.

Q. What was your wife's income?

A. What was my wife's income?

Mr. Leonard: I object to that as immaterial.

Mr. Athearn: This is just half of community income. We are entitled to know.

The Court: Objection overruled.

A. Zero.

Q. (By Mr. Athearn): In other words, the combined earnings of yourself and wife during 1946 was \$600? A. 1949.

Q. Pardon me, 1949. [44] A. True.

Q. You say you have two children?

A. Yes.

(Testimony of Aubrey L. Charman.)

Q. How much income tax did you pay in 1949?

A. I don't think I paid any.

Q. You filed a return showing \$600 income but no tax?

A. That is right.

The Court: Did you seek employment elsewhere?

A. Yes, sir, besides running the insurance business.

The Court: Where? [45]

A. Where? Around my domicile in Los Altos, Palo Alto.

The Court: What nature of work?

A. Anything that I could do, and was handling the insurance business at the same time.

The Court: All right. proceed.

Q. (By Mr. Athearn): Where did you get money to set up this launderette business?

A. Sale of my place and borrowing money.

* * *

Q. (By Mr. Athearn): How is the launderette business doing?

A. It isn't paying expenses yet.

Q. You have had it how long?

A. Four months.

Q. How do you anticipate your income will be during the balance of the year?

A. It's income will increase slowly. To what extent, nobody knows. [46]

Q. Depends on your energy, doesn't it?

A. Depends a great deal on my energy, yes. Somewhat on the harvest of crops locally.

(Testimony of Aubrey L. Charman.)

Q. Have you any estimate what the income of that business will be when it is running at full tilt and established?

A. No. I can give you a reason for that answer.

Q. Go ahead.

A. It is a peculiar situation. Since I have been moved in there I have found out that it is a very peculiar little town. Lodi is a lovely little town, lot of pleasant people; but on the other hand it is relatively a wealthy town and a proportionately large number of people own their own washing machines, and when they get a nickel they do what I should have done—hang on to it. In other words, they don't patronize a launderette as much as they would in San Francisco in an apartment house area, so whether it will turn out or not——

Q. You are hoping it will turn out successfully?

A. Absolutely.

Q. I show you here a photostatic copy—what appears to be a photostatic copy of a check in the sum of \$1,888.25 appearing to be from the defendant to you, and ask you if you have ever seen that document before? A. Yes, sir, I have.

Q. Drawing attention to the typewritten portion on the back reading: "This payment is made in accordance with an arbitration [47] award dated 11-10-48 and constitutes full and complete severance of the employer/employee relationship and is in satisfaction of all claims of whatever nature against the employer arising out of such relation-

(Testimony of Aubrey L. Charman.)

ship including but not limited to all claims for salary accrued and vacation earned but not taken." And directly under that in handwriting, "Signed under protest as to terms and conditions, A. L. Charman."

Now, is the handwritten part of this in your writing? A. Yes, sir.

Q. And the typewritten statement was there when you signed that? A. Yes, sir.

Q. You state you signed under protest, is that right? A. Yes, sir.

Q. As to terms and conditions?

A. Yes, sir. [48]

* * *

Mr. Athearn: Perhaps we should offer the document now as Defendant's Exhibit next in order.

Mr. Leonard: No objection.

The Court: It may be admitted and marked.

(Thereupon the check above referred to in the amount of \$1,888.25 was received in evidence and marked Defendant's Exhibit L.)

Mr. Leonard: Your Honor please, we have the objection I had to all these matters that arose out of the collective bargaining relationship. That is the culmination of that. Apart from that, no objection.

Q. (By Mr. Athearn): You stated it was under protest as to terms and conditions. What do you think the terms and conditions should be of that payment?

A. Terms and conditions should not have been

(Testimony of Aubrey L. Charman.)

payment on severance. That should have been transferred to Communications Department.

Q. Then you felt that the proper agreement and understanding between the parties was that you were entitled to this sum of money plus a job in the Communications Department, is that right?

A. Yes, that is right.

Q. Now, in your complaint you have asked for \$10,000 severance pay. Do you think this sum of money should be deducted from any severance pay you get?

A. Depends upon what the severance pay is based on. Our [49] \$10,000 severance is based upon retirement more than anything else. If we had stayed with the company we would have got company money in retirement, interest on our money that was in there.

Q. If you had a job with the company would you have gotten that sum that has been shown in that check?

* * *

A. I don't know. [50]

* * *

Redirect Examination

By Mr. Leonard:

Q. Mr. Charman, directing your attention to Defendant's Exhibit A, which is a communication from you to the company under date of November 5, 1940, I think you testified on cross-examination

(Testimony of Aubrey L. Charman.)

you didn't recall sending that communication, is that correct?

A. That is correct.

Q. You don't challenge that that is your signature? A. No, that is my signature.

Q. And you don't say you did not send the communication, but that you have no present recollection of having sent it, is that correct?

A. That is correct.

Q. If the company records indicate or reflect that in fact you did send that communication to the company on or about the 5th of November, 1940, you wouldn't contest or challenge that fact, is that right? A. That is right.

Q. On or about the date you sent such communication, if you did send one, had there been any prior discussions with respect to this matter of transferring to the Navigations Department, or did you just send this out of the blue, so to speak?

A. No, we were requested whether we wanted to go into the Navigations Department, and it seems to me like we were told that those of us that offered to take on this added responsibility [52] would be chosen from the senior man down on the list. And we had to answer by letter, that was apparently it.

Q. Was it as result of your discussions with company officials that you sent the communication, if you did send it? A. Yes.

* * *

Q. (By Mr. Leonard): I think the records show

(Testimony of Aubrey L. Charman.)

you thereafter were transferred to the Navigations Department? A. That is correct.

Q. In assuming your duties, you received those communications from the company with respect to your retransfer which are now in evidence?

A. Yes.

Q. Mr. Athearn asked you whether or not you protested because your name wasn't on a Flight Radio Officers Seniority List. Did you ever see a Flight Radio Officers Seniority List?

A. No, sir.

Mr. Leonard: Mr. Athearn, I wonder if you have the original list so we might show it to the witness? May we have this mimeographed document which Mr. Athearn just handed me marked for identification?

Mr. Athearn: I would like to have it be one of the [53] defendant's exhibits.

Mr. Leonard: No objection. No objection.

(Thereupon the Flight Radio Officers System Seniority List dated November 19, 1946, was marked Defendant's Exhibit M for identification.)

Q. (By Mr. Leonard): In response to my request of Mr. Athearn he has produced a document which has been marked Defendant's Exhibit M for identification; that is, in response to my request that he produce the Flight Radio Officers Seniority List. I will ask you to examine what Mr. Athearn

(Testimony of Aubrey L. Charman.)

has produced and state whether you have ever seen that document before. A. No, sir.

Q. So that if your name is or is not on that list you never saw the list before? A. No, sir.

Q. Now, this list bears the date, or says on it "Issued November 19, 1946." On November 19, 1946, were you a Flight Radio Officer?

A. No, sir.

Q. What were you? A. Navigator.

Q. This was pursuant to a transfer which had occurred some five and one-half years prior to this date, is that right? A. Yes.

Q. Were you at that time concerned with or active in the [54] affairs of any group referred to as Flight Radio Officers? A. No, sir.

Q. Did you have any way of information concerning any seniority list that they were preparing?

A. No, sir.

Q. Did you have any way of information that your name was or was not put on the seniority list which they prepared? A. No, sir.

Q. Directing your attention to this exhibit for identification I will ask you to examine it and state whether it appears on the face of it that the seniority roster by number is based upon a date of employment?

Mr. Athearn: Oh, we will object to that.

Mr. Leonard: I think he can look at the document and state what appears on the face of it.

Mr. Athearn: He has said he has never seen the document.

(Testimony of Aubrey L. Charman.)

The Court: In the opinion of this witness he has no knowledge of this document.

Mr. Leonard: The question was, if Your Honor please, if upon examination of it he could tell whether apparently seniority was based upon a date of employment. Of course Your Honor could examine, too.

Mr. Athearn: We will stipulate it was.

Mr. Leonard: I will accept the stipulation.

Q. Now, then, Mr. Charman, based on that stipulation and the [55] list, would you examine the list and indicate to the Court, where, taking into your consideration your date of employment as October 7th, I think the record shows, 1925, where your name would be on that list.

A. Number 9. No, pardon me, Number 10.

Q. Number 10? Now then, the man whose name is on the list as Number 9 is O. J. Johnson, whose date of employment or seniority date is July 6, 1935. That is correct, is it not? A. That is correct.

Q. And the man who follows him is one H. J. Nicks, whose date of employment is November 28, 1935. A. True.

Q. And your date of employment came between Mr. Johnson and Mr. Nicks? A. Yes, sir.

Q. Everybody on the list after Mr. Nicks is junior to you in time of employment, is that correct? A. True, yes, sir.

The Court: In what classification?

Mr. Leonard: This list, I think we can stipulate, counsel, in answer to the Court's question, deals

(Testimony of Aubrey L. Charman.)

with Flight Radio Officers and their seniority.

Mr. Athearn: Yes.

The Court: All right.

Mr. Leonard: If Your Honor please, with Your Honor's [56] consent and counsel's permission I wonder if I could have the record reflect the addition, for the sake of clarification and simple understanding, of the personnel on this list,—add in pen and ink Mr. Charman's name where he says it would be so Your Honor could have a visual picture of his condition. Do you have any objection?

Mr. Athearn: Let me check it. This is the only list we have. I want to check it. That will be all right. Just mark it on there.

Mr. Leonard: Thank you.

Mr. Athearn: It will be understood the ink interlineation put in by Mr. Leonard under Number 9 on page 1, being "Charman, A. L.," is being inserted now and was not on the document when it was issued.

Mr. Leonard: That is correct.

Q. Just so the record is clear, Mr. Charman, it is correct, is it not, that I have just now, with pen and ink, inserted your name in the place on the Seniority List where you contend it would be?

A. Yes, sir.

Mr. Leonard: I will also, Mr. Athearn, if you have no objection, put the date opposite his name.

Mr. Athearn: Fine.

Q. (By Mr. Leonard): Now, at the time that this list was prepared, I think you have already testi-

(Testimony of Aubrey L. Charman.)

fied and the record [57] shows that it was the result of some collective bargaining or arbitration or whatever the procedure was, between the Company and the Flight Radio Officers group? A. Yes.

Q. That is correct, is it?

A. That is correct.

Q. Were you a member of that Flight Radio Officers group in November, 1946?

A. No, sir.

Q. Had you ever authorized that Flight Radio Officers group to bargain collectively for you?

A. No, sir.

Q. Had you ever authorized that Flight Radio Officers group to include your name on a Seniority List? A. No, sir.

Q. Or exclude your name from a Seniority List?

A. No, sir.

Q. During that entire period which, as the record shows, was more than five years, almost six years, since your transfer, you were in the Communications—excuse me, in the Navigation Department? A. That is correct.

Q. There was an entirely different group operating in that Department for collective bargaining purposes? A. Yes, sir. [58]

Q. Incidentally, during that period that you were a Navigator was it necessary for you to obtain any kind of a Government license to function as a Flight Navigator? A. Yes, sir.

Q. When you obtained—withdraw that. Was it necessary at the very outset to obtain such a license?

(Testimony of Aubrey L. Charman.)

A. No, sir.

Q. Did it later become necessary as the result of Government regulations that you obtain such a license?

A. Yes, sir.

Q. When was that, approximately?

A. 1946, perhaps. I would say 1947. I don't remember right offhand.

The Court: How long after that did you operate as a Navigator, after 1947?

A. Until November, 1948.

Q. What time in 1947 was your license, do you recall?

A. I don't recall, no sir.

The Court: All right.

Q. (By Mr. Leonard): In any case you did obtain such a license, did you?

A. Yes, sir.

Q. Also during the same period—withdraw that. As a Flight Radio Officer prior to 1941 was it necessary for you to have any Government licenses? [59]

A. Yes, sir.

Q. What kind?

A. Federal Communications Commission license.

Q. When you were functioning as a Flight Radio Officer prior to the time of your transfer did you have such a license?

A. Yes.

Q. Did you maintain that license in full force and effect?

A. Yes.

Q. During the period you were a Navigator?

A. Yes.

Q. Was it necessary—what was necessary in order to maintain the Radio Operators license in full force and effect?

(Testimony of Aubrey L. Charman.)

* * *

A. A certain amount of actual operating time on a radio circuit.

Q. How did you obtain that actual operating time?

A. By relieving the radio man for meal periods on the planes.

Q. That is on the Pan American flights?

A. Yes.

Q. Was it necessary for any official to certify you did in fact relieve the radio man?

A. Yes.

Q. Did they so certify? [60]

A. Not specifically that I did relieve the radio man, but certified my services were satisfactory.

Q. In the field of radio? A. Yes.

The Court: By that you mean you indicated you spent so many hours in getting training and you qualified yourself for your license? A. Yes.

Q. (By Mr. Leonard): During the period you were functioning for the Company as a Navigator, Company officers certified that, to use His Honor's language, you spent the requisite number of hours as a radio officer to keep your License, your radio license in effect? A. Yes. [61]

* * *

Q. You testified while you were a Navigator you also put in time as a Radio Operator?

A. Yes, sir.

Q. To your knowledge is that true of the other

(Testimony of Aubrey L. Charman.)

three plaintiffs in this case? A. Yes, sir.

Q. And to your knowledge is it true of them as it was of you that the Company certified to the appropriate Federal agency that they had put in sufficient time and their radio licenses were in fact renewed? A. Yes, sir.

Q. Do you know of any other navigators except for your four men, possibly three others, who were in the same situation? A. Yes, sir.

Q. There were other Navigators in the Pacific Division? A. Yes.

Q. How many?

A. Dixon, Campbell, Shaw, I believe it was.

Q. Any others?

A. Not that I recall offhand in the Navigators Group, outside of perhaps Ted—Theodore Hrutky.

Q. He is the brother of John Hrutky who is a plaintiff in this case? A. That is right. [62]

Q. So that in addition to the four plaintiffs there may have been four other Navigators who are also Radio Operators and were being certified as Radio Operators during the years in question, is that true? A. That is true.

Q. Possibly around eight folks in that situation?

A. Yes.

Q. In the Pacific Division? A. Yes.

Q. Do you know how many Navigators there were in the entire Pacific Division during the years in question?

A. I think the largest amount reached was 87 at one time.

(Testimony of Aubrey L. Charman.)

Q. 87? Do you know whether approximately 80 of those 87 persons were employed as Navigators after 1941 when you and the other men transferred over?

A. Yes, sir.

Q. That is correct? A. That is correct.

Q. Those persons were not persons who had been Flight Radio Officers and had been transferred into Navigation as you had been, is that correct?

A. No, sir.

Q. They were Navigators who were employed during this defense, the war period, as Navigators?

A. Yes. [63]

Q. New employees of the Company?

A. Yes.

Q. Those men also were covered—withdraw that. Those men were covered by that arbitration award received, so far as you know, of the \$2,000?

A. That is correct.

Q. Since you left their employ, the employ of the Company, in November of 1948, Mr. Charman, have you made any effort to keep up your proficiency in the field of radio operation?

A. Yes, sir.

Q. What have you done to retain your proficiency?

A. I maintained my Naval Reserve duties. I had charge of a Communications Reserve Unit at Mountain View, and I recently transferred to Lodi when I moved up there, and I am now Communications Officer in charge of Communications Equipment in the Naval Reserve Electronic Company in Lodi.

(Testimony of Aubrey L. Charman.)

Q. That is a reserve component of the United States Navy?

A. Yes, sir. On top of that I have my own amateur radio station.

The Court: Do you work at it much?

A. As much as I can. I would like to do [64] more.

* * *

(Thereupon a telegram was marked Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Leonard): This telegram, Plaintiff's Exhibit 3 for identification, Mr. Charman, is addressed not to you but to one of the other plaintiffs in this case, Mr. Cummings. First, I would like to ask you if you received an identical telegram to that? A. Yes, sir.

Q. And you have just lost your copy, and don't have it, is that it? A. Yes.

Q. All right, the telegram——

Mr. Leonard: Well, we offer the document in evidence, if Your Honor please.

The Court: No objection? It may be admitted into evidence.

(Whereupon the telegram above referred to and dated November 15, 1948, was received into evidence as Plaintiff's Exhibit 3.)

Mr. Leonard: I would like to read it to Your Honor at this point. Will it be stipulated, Mr. Athearn, so we can save some record time, that each of the plaintiffs receive an identical telegram? [65]

(Testimony of Aubrey L. Charman.)

Mr. Athearn: Yes, it will be so stipulated.

Mr. Leonard: And on the same day? All went out together?

Mr. Athearn: Substantially.

Mr. Leonard: "Dated November 15, 1948, 2:55 p.m. Effective close of business November 15, 1948, your services are terminated in accordance with arbitration award dated November 10, 1948. Letter follows. Wilson for Chief Pilot."

Q. Did you receive—you say you received such a telegram. Did you receive it on or about November 15th? A. Yes, sir.

Q. At about what time of day?

A. Shortly after 3 o'clock.

Q. In the afternoon of that day? A. Yes.

Q. Informing you your services would terminate as of close of business that day?

A. Yes. That was by telephone, by the way.

Q. You received it by telephone?

A. I received it by telephone with mail confirmation a day or so later.

Q. And what was your understanding of close of business? What time would that be?

A. Five o'clock.

Q. Five o'clock? So you had about two hours notice your services were terminated? [66]

A. Yes.

Q. On November 15th, 1948, when you received two hours notice of the termination of your service, you had been employed by the Company for about 13 years? A. True.

(Testimony of Aubrey L. Charman.)

Q. Did you thereafter, Mr. Charman,—withdraw that. Mr. Athearn produced during the noon hour a copy of a document which I would like to show you, and ask you whether or not you sent the original of that document to the Company on or about the date it bears? A. I did.

Mr. Leonard: May we have it marked, and I would like to offer it in evidence at this time.

The Court: No objection? Let it be admitted and marked.

(Thereupon letter dated December 4, 1948, Charman to Axe, was admitted into evidence as Plaintiffs' Exhibit 4.)

Mr. Leonard: May I read this to Your Honor? It is dated December 4th, 1948, addressed to Mr. D. E. Axe, Communications Manager, Pan American Airways, South San Francisco.

“Dear Mr. Axe: Due to the fact that the last arbitration award termed Non Pilot Navigators as being temporary and awarding the Company the right to release such men, in accordance with letters of January 10, 1941, signed by J. C. Leslie and G. W. Angus, and April 22nd, 1943, signed by J. H. Tilton and H. O. Gentry, I am hereby requesting assignment [67] to the Communications Department. Yours very truly, Aubrey L. Charman.”

Q. (By Mr. Leonard): Did you thereafter, Mr. Charman, receive a response from the Company to your letter of December 4th? A. Yes, sir.

Q. I show you this document, which was pro-

(Testimony of Aubrey L. Charman.)

duced by Mr. Athearn and ask you if that is a copy of the response you received?

A. Apparently that is it, word for word.

Mr. Leonard: We offer it in evidence, if Your Honor please, as our exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon letter dated December 6, 1948, Axe to Charman, was admitted into evidence as Plaintiffs' Exhibit 5.)

Mr. Leonard: I would like to read this, Your Honor. Dated December 6, 1948, addressed to Mr. Aubrey L. Charman, 619 Jay Street, Los Altos, California.

"Dear Mr. Charman: This will acknowledge receipt of your letter of December 4 wherein you request reinstatement in the Communications Department in accordance with a letter directed to you under date of April 22, 1943.

"Investigation discloses that our letter dated April 22, 1943, had reference to, and was in confirmation of, a letter drawn jointly by the Operations Manager and the Communications Superintendent under date of January 10, 1941, wherein it was stated that individuals drawn from the [68] Flight Radio Officer group for service as Navigators would be returned to the FRO group should the navigating function be deleted.

"Two factors now preclude reinstatement action on our part. These are: (a) the FRO's are now covered by a contract which definitely establishes a

(Testimony of Aubrey L. Charman.)

seniority roster upon which your name does not appear as being eligible for re-employment within the group; and (b) the intent of the letter of January 10, 1941, was that re-transfer to the FRO group might be accomplished within a reasonable time limit.

“Although no commitment exists, we regret that we do not have any ground vacancies in which we might offer you employment at this time. We shall, however, give your request for re-employment by the Communications Department every possible consideration in the future should vacancies occur wherein we might be able to utilize your services. Yours very truly, Delvin E. Axe, Manager, Communications.”

Q. In connection with Defendant's Exhibits B and C, for identification, which were the contract with the Navigators group and the Company memorandum on Placement of Navigators in December, 1944, I think you stated you did fill out a questionnaire and had an interview, is that correct?

A. That is correct.

Q. Did you submit the questionnaire to the Company? [69]

A. I believe I took it with me to the interview.

Q. By whom were you interviewed?

A. Mr. Maxwell, as I recall it.

The Court: Fix the time.

Q. (By Mr. Leonard): Yes, when did this happen, Mr. Charman? A. Date?

(Testimony of Aubrey L. Charman.)

Q. Yes, approximately. A. I don't know.

The Court: Approximately.

Q. (By Mr. Leonard): Perhaps these documents will help, the Company memoranda on which is a date December 20, 1944. Can you fix the time in relation to that? How long after that was it?

A. I think it was quite some time after 1944.

Q. The agreement which refers to the memoranda was apparently signed in January, 1945. Was it after that?

A. I believe 1946 sticks in my mind. I wouldn't say that is the date, but 1946 sticks out for some reason.

Q. Is it possible for you to help us by indicating what time of the year it was, spring, summer, winter—— A. No, I couldn't.

Q. You stated you think a year after these documents were issued? A. Yes, I think so.

Q. Well, where did the interview take place?

A. In Mr. Maxwell's office. [70]

Q. Whereabouts?

A. In South San Francisco, at the Airport.

Q. You say you took a questionnaire form with you to the interview? A. As I recall, yes.

Q. Had you then filled it out, completed it before you went in to the interview? A. Yes, yes.

Q. What was said by you and what was said by Mr. Maxwell on the question of your going back to the FRO group—withdraw that, on the question of your reemployment when the Navigator's position no longer existed?

(Testimony of Aubrey L. Charman.)

A. Nothing, specifically. As a matter of fact, I thought it was somewhat a waste of time. I took the application and looked at it. As I recall, the application named three choices of position, positions desired in case the Navigators group was done away with. The first was Communications, I believe; the second was Operations Department, and I don't know what the third one was.

Q. Are you stating that this was a choice that you indicated in the application?

A. That was the choice that I indicated in the application.

The Court: What was the choice?

A. Communications Department, and Operations Department as [71] airport manager next.

Q. (By Mr. Leonard): Communications was first choice, and Operations second?

A. That is right.

* * *

Q. At any rate, you submitted this questionnaire application to Mr. Maxwell, did you?

A. Yes, sir.

Q. Did that terminate the interview?

A. That did, except for, "Well, we will see what we can do," or words to that effect.

Q. And you went back, did you, and resumed your duties as a Navigator? A. True.

Q. Did you ever hear from the Company again in connection with that application?

A. No, sir.

Q. Now, directing your attention to Defendant's

(Testimony of Aubrey L. Charman.)

Exhibit F for identification, *with* is the document executed on April 2, 1949, that was some four and one-half or five months after your termination and some two or three months after the present [72] action was filed, that is correct, is it not?

A. That is true.

Q. All right, you stated you hadn't seen that document, but having read it you said you understood by the grapevine that the Company could lay off Flight Radio Officers on payment of \$3,000 severance pay. Is that substantially what you testified in answer to Mr. Athearn? A. Yes.

Q. On that same basis, what is your understanding of the Company's right to lay off any men on this seniority list in exchange for \$3,000 severance pay? Can the Company pick and choose any man they want to lay off, or how is that done?

A. My understanding of this present operation is that if there is to be a cut-back they offer the choice of resigning to the Senior Radio men. They can resign and take their \$3,000. If nobody chooses to resign the Company can reduce forces from the bottom of the Seniority List.

Q. In other words, to take this set-up, assume that the Company wanted to lay off ten men. The top ten men on that Seniority list, which, as I have interlineated it would include your name, would have the choice of resigning and accepting the \$3,000.

A. I think anybody on the Seniority List could go ahead and take it and resign provided no nine were before me, if you get what I mean. In other

(Testimony of Aubrey L. Charman.)

words, if the ten senior men wanted to [73] take that and take the \$3,000 they could. If those ten wanted to stay and then eleven through twenty wanted to resign, they could.

Q. In other words, the original acceptance would be men who had the seniority? A. That is it.

Q. If the Company wanted to cut back ten jobs and, let's say, only five men wanted to resign and accept the \$3,000, then how would the Company cut back the other five jobs?

A. Off the bottom of the list.

Q. Off the bottom of the list? So that if you were a Flight Radio Officer on that list, the Company, as you understand it, couldn't cut back your job and force you to accept \$3,000 until it went all the way up the list in reverse order until it reached your position? A. That is true.

Q. That is your understanding? I believe that is all. Excuse me, Mr. Charman, I remember one other matter. Mr. Charman, after your receipt of the checks which are marked Defendant's Exhibit L for identification, did you receive another check from the Company? After you received this one for eighteen hundred and some dollars, did you get another check?

A. I think I got a check for vacation accrual time.

Mr. Athearn: Your Honor, I should have offered those. I simply overlooked these two checks. I now offer them as [74] Defendant's exhibit next in order, check in the sum of \$289 to Aubrey L. Char-

(Testimony of Aubrey L. Charman.)

man bearing the notation on the back it is for additional vacation.

The Court: That may be admitted and marked.

(Whereupon the check above referred to in the sum of \$289 was admitted into evidence and marked Defendant's Exhibit N.)

Mr. Leonard: May the record show we make the same objection to this as to the other one, Your Honor?

The Court: Very well, the record so shows.

Mr. Leonard: And may I read to the Court (it is in evidence) the notation on the back. This is after the first check, which, as Your Honor will recall, said it constituted full and complete severance of the employee/employer relationship. After that this happens, a further check: "This payment is for additional vacation which was not included in the check bearing general release form for payment made to you in accordance with arbitration award dated November 10, 1948." That is typed on the reverse side of the check, and in handwriting, "Endorsed under protest as to terms and conditions, Aubrey L. Charman."

Q. Mr. Charman, for the record, the endorsement which I just read is in your handwriting, is it not? A. Yes, sir. [75]

* * *

Q. Mr. Charman, do you know what the salaries of a Flight Radio Officer who has seniority back to October 7, 1935, is with the Company at the present

(Testimony of Aubrey L. Charman.)

time? A. I believe it is \$610 a month.

Mr. Leonard: That is all.

Re-Cross Examination

By Mr. Athearn:

Q. Mr. Charman, I just have a few questions: I understood that you said that while you were a Navigator you now and then would take a little bit of experience on the radio in order to keep your licenses in force? A. Yes, sir.

Q. Did the company tell you to do that?

A. I beg your pardon?

Q. Did the Company tell you to do that?

A. Not that I ever recall.

Q. You just did it on your own hook, didn't you?

A. We did it on our own hook. Somebody had to sit on the radio circuit so the radioman could go to lunch and not leave the radio circuit empty.

Q. It is true not only Navigators have radio licenses, but pilots have radio licenses, do they, too?

A. That is correct.

Q. They do it in order to keep their own licenses? [76] A. That is correct.

Q. I think you said you would have your radio license endorsed by an officer to show you had done the work? A. That is correct.

Q. Who would do that?

A. Usually the man in charge of the Communications Department.

Q. During the period you were a Navigator who was that?

(Testimony of Aubrey L. Charman.)

A. Well, there were two of them. There was Mr. Gentry—might have been three—Mr. Axe, and I think a Mr. Gleason.

Q. How about Mr. Poindexter? Did you ever do any business with him?

A. Not for signing licenses.

Q. You would on returning from a trip take the licenses into one of these gentlemen you have mentioned and ask him to endorse it?

A. No, sir, the license would be endorsed when it was due to be retired and to be renewed.

Q. Then what did you do about it?

A. Then it was to be endorsed for the previous service.

Q. Who sent the license in?

A. For renewal?

Q. Yes.

A. Either yourself or the Company.

Q. You said in one license you did.

A. I believe I did my last one, yes. I am pretty sure I did. [77]

Q. Who would go arrange to pick up your license? A. It would be mailed to us.

Q. Pardon me? A. Mailed to us.

Q. I see. During the time you were a Navigator did you ever go into the Flight Radio Officers office?

A. Once in a while to say hello to Jack Poindexter.

Q. Do you know about when that would be?

A. No, sir.

Q. Could free access to that room—you had free

(Testimony of Aubrey L. Charman.)

access to that room any time you wanted, didn't you? A. Yes, sir.

Q. You would go in to see Mr. Poindexter?

A. Yes, sir.

Q. Do you think you were in there in the early part of 1947? A. I wouldn't know.

Q. You wouldn't say you were not in there?

A. That is right.

Q. Will you say for a fact you were not in the Flight Radio Officers room during the month of December, 1946, at any time?

A. Would I say that I wasn't?

Q. Yes.

A. I couldn't say that I wasn't.

Q. You may have been in there and——

A. That is right. [78]

Q. Seeing Mr. Poindexter?

A. That is right.

Q. You might have been in there during the month of January, 1947? A. That is right.

Q. And you are free to go in there any time you wanted? A. That is right.

Q. That is called the Flight Radio Officers' room, is it?

A. No, it was still the Office of the Chief Flight Radio Officer.

Q. It was to that point Flight Radio Officers would come in and get instructions, and so forth?

A. That I don't know.

Q. But you would go in to see Mr. Poindexter anyhow? A. That is true.

(Testimony of Aubrey L. Charman.)

Q. Did you ever notice the bulletin board in the room? A. No, sir.

Q. Never saw it at all? A. No, sir.

Q. Would you say there wasn't a bulletin board in there?

A. As far as I know there wasn't a bulletin board in there.

Q. But you wouldn't say for certain there wasn't one? Are you saying there wasn't one or that you don't know?

A. As far as I know there was no bulletin board in there. You don't go into a man's office and nose around. [79]

Q. As I understand, this Seniority List which is being referred to as Defendant's Exhibit M for identification you never saw before today, is that right? A. That is right.

Q. Therefore you haven't had a chance to examine all the way through it or its terms?

A. That is correct.

Q. However, you have stated that on the basis of your hiring date you would fall under the ninth position on it where your name has been written in by Mr. Leonard? A. That is true.

Q. I want to call your attention more carefully to this. You will notice the first page of this document has (Exhibit M) a caption "Active List"?

A. That is correct.

Q. And it goes over for several pages, name after name, until it gets a page 16 when it is captioned, "Inactive List, Group A"?

(Testimony of Aubrey L. Charman.)

A. Yes.

Q. You have never examined over this far in the List? A. No.

Q. Further down on page 17, "Group B"?

A. Yes.

Q. And calling your attention to page 19, you have never read that page before, then? [80]

A. No.

Q. I would like to call your attention to the fact that that page starts with "Notes," and Note 5 reads: "On the Inactive List, Group B consists of those former Flight Radio Officers who accrued seniority as such—" pardon me, I meant Note 4:

"On the Inactive List, Group A consists of those former Flight Radio Officers who are now in Ground positions involving supervision of Flight Radio Officers and who therefore continue to accrue seniority."

A. Yes.

Q. Now, on November 19, 1946, were you employed in a ground position involving supervising Flight Radio Officers? A. No, sir.

Q. Then I call your attention on page 19 of Exhibit M to Number 5, the note which reads:

"On the Inactive List, Group B consists of those former Flight Radio Officers who accrued seniority as such but who are no longer accruing seniority due to the nature of the positions held by them since leaving the Flight Radio Officers group and those who have been

(Testimony of Aubrey L. Charman.)

relieved from the group due to reduction in force."

On November 19, 1946, you were not in the Flight Radio Officers group, were you?

A. No, sir. [81]

* * *

Q. On November 19, 1946, you were a former Flight Radio Officer who was no longer in that position?

* * *

A. That is true, with a contract to return to it.

Q. (By Mr. Athearn): Now, I think you mentioned about some other people working for the Pacific Division of the defendant who were in somewhat the same position as yourself, is that [82] right? A. That is true.

Q. I think we had eight persons, approximately, who were former Flight Radio Officers who were working as Navigators at a subsequent time?

A. That is true.

Q. I think you mentioned the name of Theodore Hrutky, is that correct? A. That is true.

Q. He is the brother of one of the plaintiffs?

A. True.

Q. Calling your attention to page 3 of the Seniority List, Exhibit M for identification, and particularly to the person on the Active List designated at Number 68, "Hrutky, T. M.," is that the gentleman you refer to? A. Yes.

Q. After his name under the caption "Seniority Date" it shows 3-29-40, is that correct?

(Testimony of Aubrey L. Charman.)

A. That is correct.

Q. At any rate the first date Mr. Theodore Hrutky went to work for the defendant was on March 29, 1940? A. I guess so.

Q. Isn't it a fact he went to work a long time before that? A. I don't know.

Q. Isn't it a fact he is a person who was a Flight Radio [83] Officer at the same time you when you were transferred out of the group?

A. No.

Q. What had happened to him in 1941?

A. I believe he was still on the ground. I don't know whether he was.

Q. I see. He was in the Communication Department? A. That is correct.

Q. Then he became a Navigator?

A. It was about—no, he became a Flight Radio Operator, first, I am pretty sure, then a Navigator.

Q. Pretty much like yourself, is that correct?

A. Yes.

Q. Then by the time this list came out he was back as a Flight Radio Officer? A. True.

Q. But you don't know whether the date 3/29/40 is the time he went to work for the Company actually, or whether it is a simulated seniority date?

A. I do not know.

Q. Now, referring to this telegram, Plaintiffs' Exhibit 3 for identification, as I understand it a similar wire was telephoned to your home?

A. True.

(Testimony of Aubrey L. Charman.)

Q. You were at home on that day? [84]

A. Yes.

Q. You were not working that day?

A. I wasn't called to duty that day, no.

Q. Had you been working the day before?

A. I couldn't say.

Q. Have you any idea? A. No, sir.

Q. Isn't it a fact that you hadn't done any work since May of 1948?

A. No, sir, that is not true.

Q. You had been actually flying?

A. Not flying, no.

Q. What had you been doing?

A. Ground activities for the Company, whatever was requested of us.

Q. What was requested of you?

A. Ground activities of various types.

The Court: Give me some idea what you mean by ground activity.

A. Check airplanes prior to departure to see all navigation equipment was aboard and take it off the airplane and send it back to the checker after the airplane arrived from trips. Oh, various things, various times I had various types of jobs. I can't recall them all now.

Q. (By Mr. Athearn): How long had it been since you had acted [85] as navigator prior to the time you got that wire?

A. I don't know when I made my last trip.

Q. Do you think it was a day or two before?

A. No, quite some time.

Q. Maybe six months before?

(Testimony of Aubrey L. Charman.)

A. I believe it was over six months.

Q. You had been grounded for six months before you got the wire, hadn't you? A. Grounded?

Q. Yes.

A. Let's not use the term "grounded."

Q. You hadn't been doing any flying?

A. That is true.

Q. They had been giving you and the other Navigators minor duties to perform? A. True.

Q. How many hours a week do you think you put in on the ground duty?

A. That varies. I don't know.

Q. Do you think you put in 40 hours a week?

A. I think it would average just about 40 hours a week.

Q. You knew this arbitration was pending involving Navigators at the time you got the wire, did you not? A. True.

Q. So in truth the notice you got was not a complete surprise? [86] A. Absolute surprise.

Q. You didn't think the decision was going to come out that way, did you? A. No, sir.

Q. But you knew the whole matter was up for decision before the Arbitration? A. Yes, sir.

Q. And this was a distinct disappointment to you? A. Absolutely.

Q. You felt pretty sure, didn't you, that the arbitration was going to hold that the Company was going to have to employ Navigators? A. Yes.

Q. That is the reason why you didn't take a job as Flight Radio Officer earlier, isn't it?

(Testimony of Aubrey L. Charman.)

A. No, sir.

Q. Why didn't you take a job as Flight Radio Officer earlier?

A. I don't recall a job being offered.

Q. You remember an interview you had with Mr. Maxwell in 1946, don't you? A. Yes.

Q. You recall he advised you to get back into the FRO group as fast as you could, don't you?

A. I don't recall that he said that, no.

Q. Would you say he didn't say that? [87]

A. He did not say. He didn't say it.

Q. He never said it?

A. He never said it.

Q. Did anybody ever advise you to get back into the FRO group? A. Not that I recall.

Q. But you wouldn't say no one did advise you?

A. That is true.

Q. When did you apply for an FRO job first, subsequent to the time you became a Navigator?

A. You mean after I was a Navigator when did I apply for it?

Q. Yes. A. I don't know.

Q. Now there is a letter from you here to Mr. Axe in November of—December 4th, 1949, which we are referring to as Plaintiff's Exhibit 4.

A. Yes.

Q. Is that the first time you asked for an FRO job?

A. First time I have any recollection of directly asking for an FRO job.

(Testimony of Aubrey L. Charman.)

Q. With reference to the present severance pay for Flight Radio Officers in the sum of \$3,000, you testified concerning that, your understanding of that arrangement, did you not? A. Yes, I did.

Q. That the men had to be laid off from the bottom of the seniority list unless they chose to retire? [88]

A. True.

Q. And that is your understanding of the present arrangement?

A. That is my understanding.

Q. Isn't it also your understanding of the present arrangement if the Company desired to hire no more Flight Radio Officers then every man on the List up to Number 1 could be paid off for \$3,000?

A. Why, true, sure.

Q. In other words, it is entirely up to the Company, even if you were Number 9A, if the Company wanted to lay off all but nine Flight Radio Officers you would get only \$3,000 severance pay?

A. Plus the salary in the meantime, yes.

Q. That is your understanding? A. Yes.

* * *

Redirect Examination

By Mr. Leonard:

Q. You stated, Mr. Charman, that while you were a Navigator there was endorsed on your license the fact that you did put in eight hours as a Radio Operator, and your license was forwarded to Washington for renewal?

(Testimony of Aubrey L. Charman.)

A. I believe I sent it to the local Federal Communications Office and they forwarded it. [89]

Q. You said sometimes you sent it, sometimes the Company sent it, is that right?

A. When we were active FRO's the Company handled it for us.

Q. During the period you were a Navigator did you send it to Washington? A. Yes.

Q. All during that period?

A. As far as I recall, yes.

Q. In your own testimony, brought out with respect to going into Mr. Poindexter's office, counsel referred to the Flight Radio Officers room. Where was the—where was Mr. Poindexter's office located?

A. On the second floor, of the—well, I guess you would call it the Administration Building.

Q. Where?

A. South San Francisco, at the Airport.

Q. Down at the Airport? A. Yes.

Q. Where was the Navigators' room or Navigators' quarters? Where were they located?

A. At different times they were in two buildings. One was in the north end of the Maintenance Building at the Airport and the other was in the Terminal Building.

Q. The Maintenance Building and the Terminal Building that you speak of, are they separate and distinct from the Administration [90] Building?

A. Yes.

Q. Are they removed from it by any distance?

A. Half a block to a block.

(Testimony of Aubrey L. Charman.)

Q. When you were functioning in the Navigators' group from 1941 until 1948 where did you congregate and go to get your orders, instructions, or whatever you had to get in connection with your job? A. The Navigation Office.

Q. Did you normally or usually have any duties or business that would take you to the Flight Radio Officers room? A. No, sir.

Q. Were these regarded as two separate and distinct crafts? A. Yes, sir.

Q. They had different quarters and operated differently? A. Yes.

Q. Did they have different supervisory personnel? A. Yes.

Q. And, as I understand it, you had simply been transferred from one craft to the other?

A. Yes.

Q. And all during the period in question you were operating as a component part of the navigators craft? A. That is true.

Q. At any time during that period you were operating as a [91] component part of the navigators craft were you ever offered employment in the Flight Radio Officers group by any responsible official of the Company? A. No.

Q. Then after your services as a Navigator were terminated by phone and telegram you made application for transfer back to the Communications group? A. That is correct.

Mr. Leonard: That is all.

(Testimony of Aubrey L. Charman.)

Recross-Examination

By Mr. Athearn:

Q. I don't want to extend this, but there is one question: Isn't it a fact in December of 1946, and January, 1947, both the Flight Radio Officers' room and the Navigators' room were located in the Administration Building?

A. I don't recall the Navigators office in the Administration Building. If I am wrong, if somebody would correct me. I honestly don't recall it.

Q. Your recollection is that the Navigators' office was never in the Administration Building?

A. That is my recollection.

Q. And the Flight Radio Officers' room was on certain occasions in the Terminal Building and at others in the Hangar Building, was it?

A. The Flight Radio Officers?

Q. Yes. [92]

A. The Flight Radio Officers, so far as I know, was on the second floor of the Administration Building.

Q. During the entire time that you were a Navigator? A. As far as I can recall, yes.

Mr. Athearn: That is all.

A. No, excuse me, not during the entire time I was a Navigator. During the entire time we were in the South San Francisco Airport.

Q. (By Mr. Atheran): Yes, I understand, yes. During the entire time you were a Navigator and the Company's base was in South San Francisco.

(Testimony of Aubrey L. Charman.)

A. May I make this statement? While we were on Treasure Island the Communications Office and the Navigation Office were right next door to one another, but that terminated when we moved to Mills Field. I don't recall the date.

Mr. Athearn: No more questions.

Mr. Leonard: Prior to 1946 when this document was promulgated? A. Yes.

Mr. Leonard: Mr. Athearn, in view of your comments with respect to Group A and Group B, can it be stipulated Mr. Charman's name appears in neither Group A or Group B on this?

Mr. Athearn: His name appears no place on the list except where you inserted it this morning. [93]

* * *

JOHN ANDERSON HRUTKY

a plaintiff herein, was called on his own behalf, sworn.

The Court: What is your full name?

A. John Anderson Hrutky.

The Court: Where do you live?

A. Oakland, California.

The Court: And the address?

A. 3947 Gardenia Place.

The Court: How long have you lived there?

A. About a year and half now.

The Court: All right.

(Testimony of John Anderson Hrutky.)

Direct Examination

By Mr. Leonard:

Q. What is your age, Mr. Hrutky?

A. Thirty-five.

Q. What formal education do you have?

A. Oh, about two years—three years high school.

Q. And thereafter— [94] A. After that?

Q. What did you do?

A. I went to a radio school for approximately two years.

Q. Which radio school?

A. Central, in Oakland.

Q. State generally what you studied there?

A. Well, electrical shop work, wiring, both radio and electrical wiring, and radio theory, and operating and maintenance work of transmitters and receivers, all the background necessary to get a Commercial Radio Operator's License.

Q. Did you ultimately obtain a Commercial Radio Operator's License? A. Yes.

Q. Approximately when did you first obtain it?

A. I believe it was in 1932 or 1933.

Q. And did you thereafter obtain employment as a radio operator?

A. Yes, with the Alaska Salmon Company. I went to Alaska as a radio operator during the fishing season.

Q. This was maritime? A. Yes.

Q. Radio operator aboard ship? A. Yes.

(Testimony of John Anderson Hrutky.)

Q. How long did you continue to work as a radio operator aboard ship?

A. I went with United Fruit Company for about two years. [95] Well, up until the early fall of 1937.

Q. Then what employment did you obtain?

A. At that time I started in as Assistant Radio with Pan American Airways.

Q. During the time you were radio operator aboard ship, before you went to Pan American, what licenses, if any, did you hold?

A. I held a Second Class Radio Operator's License, and after I attained sufficient experience and training I succeeded in obtaining a First Class License.

Q. So that when you went to work for Pan American you had a First Class Commercial Maritime Radio Operator's License, is that correct?

A. Yes.

The Court: Fix the time when you went to work for them.

A. Let's see, I think it was July, 1937.

Mr. Leonard: I think we can stipulate in just a moment, Your Honor, to some of these facts. I think, if Your Honor please, we are prepared to stipulate, and this will save the record. For the record, that Mr. Hrutky was first employed by defendant herein as an Assistant Radio Operator on July 16, 1937.

The Court: All right.

Mr. Leonard: That he became a Flight Radio Officer, or reclassified as Flight Radio Officer on May

(Testimony of John Anderson Hrutky.)

1st, 1938, and was reclassified as a Radio Operator on August 1st, 1940. He was [96] reclassified as a Junior Navigator on February 1st, 1941; reclassified as Non-Pilot Navigator on June 18, 1941. He was reclassified as a Navigator on March 16, 1947. He was reclassified as a Non-Pilot Navigator on March 16, 1948. And his employment was terminated on November 15, 1948.

Mr. Athearn: We will so stipulate.

Mr. Leonard: Thank you.

The Court: The record so shows.

Q. (By Mr. Leonard): In a very general way, Mr. Hrutky, will you state what your duties as an Assistant Radio Operator and a Radio Operator were? Well, let me ask you this. I think there won't be any objection. Those were ground duties, were they? A. Yes.

Q. And you performed duties as radio operator on the ground? A. Yes.

Q. You were here this morning, were you, when Mr. Charman testified with respect to the nature of those duties? A. Yes, I was.

Q. And the duties you had were substantially as he described them? A. Closely parallel, yes.

Q. Now, the stipulation which we have entered into on the record shows for the period of time of from May 1st, 1938, until August 1st, 1940, you were a Flight Radio Officer. Those duties had to do with operating radio equipment, maintaining [97] radio contact how? Aboard aircraft in flight?

A. Right.

(Testimony of John Anderson Hrutky.)

Q. And you also heard Mr. Charman's general description of the nature of those duties, and would you say those are substantially the same as the duties you performed in that capacity? A. Yes.

Q. Will you tell us what ground duties, and so on, you performed, and airport radio duties?

A. Well, I started with the Company, I was assigned first at the Alameda Station on the ground, and we were working a point to point station with various island stations from Honolulu to Manila, exchanging weather information and so forth. Then I also manned a DF station—direct finding station, direct bearing of aircraft which was transmitted to the plane and was an act of navigation. And was Assistant Radio Operator in Wake Island approximately six months.

Q. During what period of time?

A. That was from the fall of 1937 until the spring of 1938. In 1938 I transferred to flight duty and stayed on there as a Flight Radio Officer for several years, I think two years.

Q. What route did you fly?

A. Oh, from Alameda to Hongkong and return. That was before the SOPAC trips were started.

Q. By SOPAC you mean South Pacific?

A. Yes. I think it was in about June, 1940, I was reclassified [98] again, somewhere around that date, as a Chief Radio Operator and stationed about seven months at Canton Island. About that time the SOPAC operation started, and so we manned ground stations on that route. I stayed there until

(Testimony of John Anderson Hrutky.)

about February of 1941, but while I was there I also studied Navigation, and that was a correspondence course offered to any personnel that desired to take advantage of it.

Q. This was a course put out by the Company?

A. That is true.

Q. For its personnel that desired to study Navigation? A. Yes.

Q. And you studied it?

A. I think it was prepared with the idea in mind that airport personnel, particularly airport managers, should take advantage of it in case an airplane should go down in the vicinity of one of our islands, they should be able to man the station lines in the vicinity of the landing and assist. About that time when I was based at Canton Island, I somehow received the word from the Company that there would be a possibility of joining up the Operations Department as Navigator, I don't remember through a letter or by word of mouth or how it happened. I made request for that duty at that time.

The Court: When was that? Fix it as near as you can. A. That was in the fall of 1940.

Q. (By Mr. Leonard): In response to that information which [99] you had received, did you submit a communication to the Company on that subject, a possible transfer into Navigation?

A. Yes.

Mr. Leonard: May I have this marked as exhibit next in order?

(Testimony of John Anderson Hrutky.)

Mr. Athearn: I would like to have that be one of our exhibits, as part of our case.

Mr. Leonard: No objection. I don't care how it is marked.

The Court: Very well.

(Thereupon memorandum dated November 12, 1940, from John A. Hrutky to Division Superintendent, was marked Defendant's Exhibit O in evidence.)

Q. (By Mr. Leonard): I show you what has been marked as Defendants' Exhibit O, and ask you if that is the original of the communication you addressed to the Company on or about November 12, 1940?

A. That is my signature, but I don't remember what it is, but that is it.

Q. Does that look like it? A. That is it.

Q. You don't make any contention that you didn't send this communication?

A. No. [100]

* * *

Q. (By Mr. Leonard): Thereafter, Mr. Hrutky, did you receive any response from the Company to that Communication?

A. Well, I don't recall any official answer to that particular letter except that upon my termination of duty, tour of duty at Canton Island I got back to San Francisco, I was transferred to the Operations Department and received this other letter.

Q. You say you returned to San Francisco, and

(Testimony of John Anderson Hrutky.)

upon returning [101] to San Francisco you were transferred to Operations. According to the stipulation with counsel for defendants, Company records show you were reclassified as Junior Navigator on February 1st, 1941, some three months or thereabouts after the date of that document we just read. Would that be about the time you were transferred to Operations? A. Yes.

Q. February, 1941, or prior to that time that you were transferred to Operations, you had received, had you not, a communication from the Company in connection with that transfer? A. Yes.

Q. In that connection I direct your attention to Plaintiff's Exhibit 1. A. Yes.

Q. Which, as the record shows, is a document actually addressed to you, of all the plaintiffs, and I ask you if that is the letter you got from the Company? A. That is it, correct.

* * *

Q. Thereafter did you assume your duties as Navigator? A. I started training.

Q. First you took training? How long did that training course last? [102]

A. Until my last reclassification around June.

Q. June 18, 1941, is that about right?

A. Yes.

Q. So that it was about a three and one-half month's training course? A. That is correct.

Q. Then in June, 1941, did you actually commence flying as a Navigator?

(Testimony of John Anderson Hrutky.)

A. That is right.

Q. And during the time you were flying as a Navigator, I take it, you too received a copy of the communication which is in evidence as Plaintiff's Exhibit 2; letter of April 22, 1943, referring to the matter of your transfer back to Communications?

A. Yes.

Q. You received such a communication?

A. Yes.

Q. After that, you continued, did you not, to fly as a Navigator? A. That is right.

Q. According to the stipulation we have with the Company, you were reclassified as a Check Navigator in March, 1947, is that correct?

A. True.

Q. Will you state what a Check Navigator is? Apparently Mr. Charman wasn't, so we have a new classification here. [103]

A. Let's see, 1947. I believe that is starting training additional navigators, also junior pilots as navigators, and at first they had to take a course of navigation training on the ground, then they were assigned in the air to make several trips as navigators under supervision of a qualified Navigator.

The Court: That is what you call a Check Navigator.

A. Generally a check had him on his last trip, gave him additional follow up work.

The Court: Final work-out?

A. That is right, more or less of a final work-out after additional training in the air.

(Testimony of John Anderson Hrutky.)

Q. (By Mr. Leonard): If I understand it, your responsibilities and duties as Checker entailed your checking on the navigational abilities of other personnel, is that right? A. That is right.

Q. And did you have, in that position, occasion to pass upon the abilities of other persons?

A. I passed them or rejected them.

Q. You passed them or rejected them depending on how they responded to the test, I suppose?

A. That is right.

Q. According to our stipulation you remained in that position for just about one year, is that about correct? A. Yes.

Q. Was there any kind of salary differential?

A. We received an additional sum, I think, of \$25 a month extra.

Q. In that connection, how much was your salary as a check Navigator?

A. At that time \$625 per month.

Q. The other navigators who were not check navigators were receiving \$600 a month?

A. That is right.

Q. You got a \$25 differential for those other duties, is that right? A. That is correct.

Q. Then after a year of operating as Check Navigator you became a Non-Pilot Navigator again, is that correct? A. That is correct.

Q. From the time you went back to Navigator—that meant you went back to Navigator aboard aircraft in actual flight? A. True.

Q. During the time you were Check Navigator

(Testimony of John Anderson Hrutky.)

where did you operate from? Where was your base? A. San Francisco.

Q. During the time both before and after you were Check Navigator, while you were a navigator aboard aircraft in flight, what routes did you fly?

A. Substantially the same as we flew as regular navigators. Well, it was throughout the Pacific Division. [105]

Q. From San Francisco to points in the Pacific?

A. Yes.

Q. This of course, was, partly anyway, during war time? A. That is true.

Q. Then finally you terminated—your employment was terminated in November, 1948?

A. Yes.

Q. At that time you too, I take it, were the recipient of the telegram such as has already been introduced in evidence as Plaintiffs' Exhibit 3?

A. That is true. I received one just like that.

Q. Thereafter did you make a written request of the company that pursuant to the earlier memoranda which are in evidence, the earlier agreements, you be restored to duty in the Communications Department? A. I did.

Q. I show you carbon copy of a letter from you to the Division Communications Superintendent dated December 4, 1948, and ask you if you sent the original of that to the Company? A. I did.

Mr. Leonard: May I have this marked in evidence, if Your Honor please?

(Testimony of John Anderson Hrutky.)

The Court: It may be admitted and marked.

(Thereupon the letter above referred to, dated December 4, 1948, Hrutky to Division Communications Superintendent, was [106] admitted into evidence and marked Plaintiff's Exhibit 6.)

* * *

Q. Thereafter, did you receive an answer from Mr. Axe, the Communications Manager, to your request? A. That is correct.

Q. This letter I handed you is the answer?

A. Yes.

Mr. Leonard: We offer the original of Mr. Axe's reply under date of December 6, 1948.

The Court: It may be admitted and marked.

(Thereupon the letter above referred to dated December 6, 1948, Axe to Hrutky, was admitted into evidence as Plaintiffs' Exhibit 7.)

* * *

Q. Since November 15, 1948, when you were terminated, Mr. Hrutky, have you sought employment? A. Yes.

Q. In what fields have you sought employment?

A. First as a navigator, particularly with Trans-Ocean Airline, and I heard of—talked with some of my friends what results [107] they had with another airline.

Q. Did you make any application to any airlines for employment? A. Trans-Ocean.

(Testimony of John Anderson Hrutky.)

Q. That is an airline? A. That is right.

Q. Were you able to get a job with them?

A. No. Things were described as being very slow at that time.

Q. Did you make any effort to get employment as a marine radio operator?

A. Yes. I attempted to go back to sea.

Q. Did you succeed?

A. Well, this year, I did, yes.

Q. You have been able finally to get employment as a marine radio operator, is that right?

A. Well, not exactly a marine radio operator.

The Court: Tell us about it.

A. I just came back from a trip on a tuna boat, a tuna fishing boat, as radio operator, navigator and fisherman. I have been gone approximately three months on that.

Q. (By Mr. Leonard): When did you first obtain that employment?

A. January of this year.

Q. Were you able to obtain any employment between November 15, 1948, and January of this year? A. No. [108]

Q. You sought such employment and were unable to obtain it? A. That is right.

Q. In January of this year you obtained a combination job as fisherman, radio-man aboard a tuna boat and have finished the first trip?

A. Right.

Q. How long were you aboard that vessel?

(Testimony of John Anderson Hrutky.)

A. Since January 18th until April 19th, of this month.

Q. Just about three months?

A. Just about three months.

Q. What were your earnings in that period?

A. Well, I don't know if I can tell. I haven't been paid for that trip yet.

The Court: Well, what is your best thought on the subject?

A. Well, starting in on a share basis like that, I started out as a quarter-share man and on subsequent trips I should be raised gradually until reaching full pay status.

The Court: How many aboard the ship?

A. There is a crew of fourteen.

The Court: How did you get in on a quarter?

A. I don't understand you, sir.

The Court: You say you get a quarter?

A. Oh, quarter share.

The Court: Share?

A. That is right.

The Court: And the other men are on salary?

A. No, no one on board is paid a salary. You are on a share basis.

The Court: Percentage basis?

A. That is right, of the catch.

The Court: Of course you discussed it on the boat there? You know what you got, don't you?

A. Yes, we have an idea but, well, I think this trip a full share man would net approximately \$2,000.

(Testimony of John Anderson Hrutky.)

The Court: Do you get one-fourth of that?

A. That is right.

The Court: Well, that was a wonderful new experience.

A. Well——

The Court: Where would the tuna fish go, what territory?

A. We went down the coast of Central America to Panama, off the coast of South America, northern South America, anywhere from 50 to 250 miles off-shore all the way up and down Central America.

The Court: Is that catch left in the boat until you come back?

A. No, they are in brine cells. Ammonia circulates through a cooling system of pipes and it freezes them.

The Court: How many tuna did you catch?

A. About 225.

Q. (By Mr. Leonard): So as you sit here, as near as you now estimate, Mr. Hrutky, for your three months' work on that tuna [110] vessel you will get about \$500, is that right?

A. Well, that is the way it looks now.

Q. It isn't definitely decided, but as near as you can figure your portion of the pay it will be about \$500?

A. That is right.

Q. Mr. Hrutky, directing your attention to the Defendant's Exhibit M, for identification, which appears to be some kind of Flight Radio Officers Seniority List——

A. Yes.

(Testimony of John Anderson Hrutky.)

Q. —I ask you to look at it and tell me if you have ever seen it before?

A. I can't say that I have.

Mr. Leonard: May we, Mr. Athearn, on the same conditions as before, so the Court will have the visual picture on it concerning Mr. Hrutky, insert Mr. Hrutky's name on this based as to date of his hire?

Mr. Athearn: You are inserting him on the assumption he had been on the active list, and, in other words, acting as a Flight Radio Officer on November 19, 1946?

Mr. Leonard: Yes, I am inserting him——

The Court: No necessity for marking those various documents. Let the record speak for itself.

Mr. Leonard: All right, if Your Honor please. I simply thought it would be easier to get a visual picture of it, that is all. [111]

Q. (By Mr. Leonard): Mr. Hrutky, showing you Defendant's Exhibit M, for identification, and bearing in mind the stipulation you were first employed by the Company as Assistant Radio Operator on July 16, 1937, will you state after whose name or between which two names your name would appear on this list, or what the number would be?

Mr. Athearn: This is confusing. I submit that this witness has testified on November 16, 1946, he wasn't working as a Flight Radio Officer; hence, he would not come within the terms of the list, ever have been put on the active list. He would be on Group B. So I think the witness should indicate on Group B, the inactive list, how much seniority he

(Testimony of John Anderson Hrutky.)

would have retained but not accrue as of that time. This is an imaginary person who is being retained on the list now.

The Court: On the classification as he suggests here he wouldn't be on that list. If he was on the list, he would be under Classification B?

Mr. Leonard: That is their theory of it. I have no objection to counsel having Mr. Hrutky indicate where he should be on Classification B on his theory. What I am trying to do is put in where they would be on this list under our theory, and I take it that at the conclusion of the case each side will argue to Your Honor with respect to our theories.

Mr. Athearn: These are personal theories to be argued back and forth, if it were not for the precise terms of the [112] contract. The contract says clearly on page 19, Number 5, men who were not working as Flight Radio Officers but otherwise employed with the Company were to be given an amount of seniority which they would retain but not accrue. For this witness now to write his name in in some other place on the list would be not to follow Mr. Leonard's theory of the case, but to contradict the terms of the contract.

Mr. Leonard: On the contrary, the case consists of a contract made by the Company on two separate occasions to this man saying, "When your duty as a Navigator is completed we will return you to the Communications Department in a position commensurate with your length of service," and "commensurate with your length of service" would be

(Testimony of John Anderson Hrutky.)

putting him here where he belongs. That is the contract that was made with them. If they return—I mean, if the Company returned them to a position commensurate with length of service, that would bring him on the list in a position commensurate with the length of service as far as the employee is concerned.

The Court: I will give you a record on it and you may develop the record.

Mr. Leonard: I am simply trying to indicate where he would go if the contract was carried out.

Q. Now, Mr. Hrutky——

A. Right in there somewhere. (Indicating.)

Mr. Leonard: Well, as a matter of fact, exactly as the [113] witness points out, it is on the same date. Number 19 on List 1, M. W. Eldred, 7/16/37.

Q. (By Mr. Leonard): That is exactly the same date as you were employed? A. Yes.

Q. I take it from that, Mr. Hrutky, so far as you know, you and Mr. Eldred were first employed as Flight Radio Officers, by the Company on the same date? A. That is true.

The Court: Did you go on together?

A. No, sir, I don't know the gentleman.

Q. (By Mr. Leonard): You transferred to Navigation, as you testified here? A. Right.

Q. Mr. Eldred apparently did not?

A. Apparently not.

Q. Mr. Eldred, on the Seniority List back in 1940, appears as Number 19 on the List.

A. Right.

(Testimony of John Anderson Hrutky.)

Q. If you hadn't transferred to Navigation, presumably you would be right up there with Mr. Eldred? A. That is right. [114]

* * *

Friday, April 28, 1950

Mr. Leonard: If Your Honor please, I have some matters I would like to question Mr. Hrutky about before I turn him over for cross-examination.

In the first place, if Your Honor please, before we recessed last night we closed the record with reference with my request to insert Mr. Hrutky's name on this Exhibit M for identification, the Seniority List. We had already done it with Mr. Charman, and at this time I renew my request because I think the record would be more complete if it indicated on the face of the document, as with Mr. Charman, where we think the other plaintiffs should be. Simply for the purpose of completing the record, I ask the Court's permission to proceed the same way with Mr. Hrutky.

The Court: As far as the Court is concerned, I am concerned about marking others' papers, unless they join with you and consent to it.

Mr. Athearn: Your Honor, we will. The document has no inherent value, only historic value. But if these names are going to be inserted on the active list contrary to the terms of the list, then they should also be—it is Mr. Leonard's contention that is where they should be. I think the same insertion should be in the names on the inactive list, where

we contend the document says they should be. I see no purpose [115] in writing in the names, frankly, because I don't think there is any doubt that if these gentlemen were on the list where Mr. Leonard says they should be, they would all at the time, November 15th, 1948, have been on the Working List. If they are where we say they should be, they would all have been off the Working List, so what purpose is served in inserting them?

Mr. Leonard: I thought it would make the record clear. I have no objection if Mr. Athearn wants to insert on the other list where he thinks the names should be. I thought it would be easier for this Court and possibly the Appellate Court.

The Court: It is clear to me, but if this case goes forward very often there is misunderstanding in relation to documents that are in evidence. I will give you a record on whatever you want, but in relation to marking up your opponent's documents, unless he consents to it I will deny the request.

Mr. Leonard: If Your Honor please, I don't want to labor the point, but I think for the sake of the record I should say, Mr. Athearn did provide me with the first two pages of this document, and I would be perfectly willing to substitute that for the original if that would serve the same purpose.

Mr. Athearn: I am not concerned about marking up the original.

The Court: I think it would be better to make your record [116] here but not mark the document.

Mr. Leonard: Very well.

JOHN ANDERSON HRUTKY

a plaintiff herein, resumed the stand, previously sworn.

Direct Examination
(Continued)

By Mr. Leonard:

Q. Then for the record let me ask you, Mr. Hrutky, your original date of employment was 7/16/37? A. Yes.

Q. That would put you on this list in the same position that a Mr. Eldred, who is number 19 on this list? A. That is right.

Q. According to the records Mr. Eldred and you were both hired in the Communications Department on the same day as Radio Operators?

A. That is true.

Q. And you transferred over to the Navigation Department under the circumstances we have here outlined? A. True.

Q. Therewith we find you are not on the list, but we find Mr. Eldred is, or was in 1946, Number 19 on the list? A. Right.

Mr. Leonard: If Your Honor please, counsel is apparently prepared to stipulate with me during Mr. Hrutky's employment as a member of the Company he had 1,968.19 hours as a Flight [117] Radio Officer and 4,886.15 hours as a Non-Pilot Navigator, or a total number of flight hours of 6,854.34.

Mr. Athearn: I will stipulate those are the facts, but I am wondering what all this has to do with the case. If it has any purpose I will be happy to let

(Testimony of John Anderson Hrutky.)

it in, but I think we have gone far afield. It doesn't matter where they were working or how many hours they flew. It is a question of what their rights are.

Mr. Leonard: Your Honor please, I think the Court would want to know how many hours he spent as a Non-Pilot Navigator and how many hours he spent as a Flight Radio Officer. I direct attention to the vast amount of collective bargaining contracts, and so on, which counsel has had marked for identification, which presumably he means to submit in evidence as bearing on the question whether or not these men have a right to rely on promises that the company made to them some five or six years before the contracts were entered into.

The Court: In any event, what relation has this subject matter to anything we are dealing with now, to any issue in this case?

Mr. Leonard: I think it shows the background of these men, shows the large number of hours they were engaged as Flight Radio Officers and the large number of hours they were engaged as Navigators, and I thought it would be important information for the Court to have.

The Court: The information serves no purpose that I am [118] aware of at this time, unless you indicate it to me.

Mr. Leonard: It was the obligation of the company under those two contracts of 1941 and 1943 to reinstate those men in the Communications Depart-

(Testimony of John Anderson Hrutky.)

ment. The Court might desire to know whether the men were qualified to be reinstated, and I think this evidence indicates they were so qualified.

The Court: Qualification may have something to do with it. I think it is purely a matter of classification.

Mr. Leonard: Very well, Your Honor.

The Court: So far as I am aware at the present time, at least.

Mr. Leonard: If counsel will stipulate for the record that the statement I made stand as an offer of proof with respect to Mr. Hrutky?

The Court: For what purpose?

Mr. Leonard: Offer of proof that he had the hours as stated.

Mr. Athearn: We will object to it as irrelevant.

The Court: Objection sustained.

Mr. Leonard: On my record, Your Honor, since Mr. Charman has gone, may I, based on Mr. Fisher's memorandum to Mr. Charman, make an offer of proof concerning his hours as well? I offer to prove that during Mr. Charman's employment as a Flight Radio Officer he had 1,356.01 hours as Flight Radio Officer, and 4,595.33 hours as Non-Pilot Navigator, or a total number of [119] flight hours of 5,951.34 hours.

Mr. Athearn: We object to the offer as being irrelevant.

The Court: Objection sustained.

Q. (By Mr. Leonard): Mr. Hrutky, I direct

(Testimony of John Anderson Hrutky.)

your attention to paragraph 15 of the complaint wherein damages in the sum of \$10,000 are requested on your behalf to compensate you for loss of certain benefits and privileges therein enumerated. Will you state what the benefits of the company's retirement plan are, what the retirement is, and what benefits——

A. I don't exactly know what they are, but I think that they are approximately two-thirds or three-fourths of our salary. After we retire we receive that amount.

The Court: Over a certain period of time?

A. True.

Q. (By Mr. Leonard): Do you know what the period of time is?

A. We had the opportunity of retirement at age 50. Normally at age 60 for flight personnel, 65 for ground personnel, and I think that is a reasonable value for insurance of that sort.

Q. Of course it is for the Court to determine. It is your understanding that after having been with the company for a period of time and having reached retirement age under the plan, the employee could retire at some fraction, around two-thirds or three-fourths of his full salary?

A. True.

Q. And if his salary was in the vicinity of \$600 a month, why, [120] his retirement would be \$400 or \$450 each month?

A. That is right.

(Testimony of John Anderson Hrutky.)

Q. That would be for the balance of his life, is that right? A. That is right.

Q. If you had been reinstated in Communications and had qualified under the Retirement Plan, why, you would have had the privilege of so retiring and receiving that sum of money?

A. Right.

Q. The paragraph to which I directed your attention is based, among other things, upon the benefits of that retirement plan, is that right?

A. True.

Mr. Leonard: That is all.

The Court: Tell me, what are you doing at the present time?

A. I am on that tuna fishing boat, sir.

The Court: Oh, that is right. Are you going back on another trip?

A. Yes, I am. I am supposed to leave the first of the week.

Cross-Examination

By Mr. Athearn:

Q. Mr. Hrutky, referring to the document which has been designated as Defendant's Exhibit O, which is the memorandum I believe you said you wrote on November 12, 1940, while you were stationed at Canton Island—— A. Yes. [121]

Q. ——in which you said you had heard by rumors that the "Company is considering the possibility of employing several Flight Radio Officers as Navigators." I take it from the tone of that you were rather anxious to get the assignment, weren't you?

(Testimony of John Anderson Hrutky.)

A. Naturally. It meant, we hoped, more money and our bettering ourselves.

Q. It did mean more money, didn't it?

A. We didn't know exactly whether it would or not but hoped it would.

Q. When you wrote this you didn't even know how much more money would be involved?

A. True.

Q. You were very anxious to get the assignment even though you didn't know the terms, for sure?

A. Roger.

Q. Roger means yes? A. Affirmative.

Q. It is a radio term? A. Yes.

The Court: A radio term?

A. Yes, sir.

The Court: Well, believe it or not, that is the first time I ever heard it.

Mr. Athearn. That is why I thought the record better [122] show it.

Q. As I understand, you were on Canton Island when you wrote this memorandum, were you?

A. Right.

Q. Had anyone representing the Company formally approached you about accepting this assignment? A. Not that I recall.

Q. In that letter you said you heard by the "grapevine." What did you mean by that?

A. Evidently some flight personnel passing through informed me of the situation.

The Court: I take it there was a "bull session," probably, out on the island, and you found an oppor-

(Testimony of John Anderson Hrutky.)

tunity or hoped for an opportunity?

A. That is true.

Q. (By Mr. Athearn): Then as I understand it, it was after you got back to the mainland you were actually assigned to the navigational training course.

A. That is right.

Q. And you accepted that assignment when it was offered to you?

A. Yes.

Q. Did you inquire then about what the terms would be?

A. Well, I don't exactly remember how the situation developed except that I understood that we would get an increase of salary of \$25 a month for our additional duties and responsibilities [123] as a Navigator, and also at the same time that I transferred, I received a letter from my department head, which you have there.

The Court: Approximately what date was that?

Mr. Athearn: I believe the letter's date is slightly before the transfer date, your Honor.

The Court: He gave me the year. I have in mind the war situation.

Mr. Athearn: January 21st, 1941, and about a week after that he was transferred to Navigation, is that right?

A. That is right. About a year before the war started.

Mr. Athearn: Mr. Leonard, we might in the interest of time—do you want to stipulate—I know you object to the relevancy, but how about the facts of this and the other plaintiffs being members of the

(Testimony of John Anderson Hrutky.)

Navigators Association and signing the authorization cards?

Mr. Leonard: We do object to the relevancy, as I said when questions were put to Mr. Charman yesterday. I believe it is the fact, and if it is the fact I will stipulate to the facts, reserving our objection as to materiality. That is the fact, you were a member of the Navigators Association and signed the authorization card, is that correct A. Yes.

Mr. Leonard: We will stipulate.

Mr. Athearn: How about the others? [124]

Mr. Leonard: That is correct.

Mr. Athearn: Then as I understand it, it is stipulated that all the plaintiffs after being given jobs as Non-Pilot Navigators, on or about October 27, 1944, joined the Pan American Airways Navigators Association?

Mr. Leonard: Is that the approximate date? So stipulated.

Mr. Athearn: Thereafter when the Navigators Association affiliated with the Transport Workers, CIO, they became members of that organization?

Mr. Leonard: So stipulated.

Mr. Athearn: And that on or about October 27, 1944 each of them signed an authorization card in the same form that the plaintiff Charman said he signed it?

A. True.

Mr. Leonard: So stipulated. Those stipulations are all entered into subject to objection as to relevancy and materiality.

(Testimony of John Anderson Hrutky.)

Mr. Athearn: Now will you stipulate, subject to the same objection, that the plaintiffs were all aware that on or about January 4, 1945, the Pan American Airways Navigators Association executed an agreement with the defendant governing wages, hours, working conditions, seniority and reinstatement rights of Navigators?

Mr. Leonard: I don't know if they were or not.

The Court: You might ask. [125]

Mr. Leonard: I can't stipulate because I don't know.

A. I am not too sure about the exact dates.

The Court. But otherwise?

Q. (By Mr. Athearn): You were aware an agreement was signed between the Company and the Pan American Airways Navigators Association?

Mr. Leonard: May I have the same objection to this line of inquiry?

The Court: Let the record so show. Objection overruled.

A. Generally, yes.

Q. (By Mr. Athearn): And did you ever do anything to repudiate or disclaim that agreement?

A. With the Navigators Association? No.

Mr. Athearn: Mr. Leonard, will it be stipulated—I think the pre-trial order says it, anyway,—that none of the plaintiffs ever filed a protest with the FRO Seniority Board regarding the omission of their names from the Seniority List, Defendant's Exhibit M for identification?

Mr. Leonard: I think that the pre-trial order

(Testimony of John Anderson Hrutky.)

does so state, and we are prepared to stipulate that is the fact. I think, though, in fairness to the plaintiff, the fact developed through the witness Charman on the stand developed that he was never advised of such omission and had no occasion to file a protest.

Mr. Athearn: I will go into that.

The Court: Stipulated that they didn't file a protest? [126]

Mr. Athearn: Yes.

The Court: Any of them?

Mr. Leonard: That is correct.

The Court: What did you want to say?

A. How could we file a protest if we didn't know that we were omitted from the list?

The Court: Well, whether you did or not we want to get the record on it.

A. I see.

Mr. Athearn: Let's go into that now.

Q. Do you know Mr. Poindexter?

A. Yes, sir.

Q. Do you know where the Flight Radio Officers' room was at Pan American Airways during the latter part of 1946 and the early part of 1947?

A. That is when we were at Mills Field. Yes.

Q. You knew that room? A. Yes.

Q. Mr. Poindexter's desk is in there, isn't it?

A. I believe so.

Q. Did you ever go in that room during the latter part of 1946 and early part of 1947?

A. I have no memory of any particular date, but undoubtedly I did.

(Testimony of John Anderson Hrutky.)

Q. You did go into that room on occasion, I take it? [127] A. Yes.

Q. For what purpose?

A. Oh, bull sessions.

Q. For friendly conversations?

The Court: I am afraid I brought that on. I brought in that word "bull session,"

Q. (By Mr. Athearn): Did you ever notice a bulletin board in the Flight Radio Officers' room?

A. Well, I may or may not have. I might have, in other words, but there is nothing directly concerning me in the office except Mr. Poindexter's friendship.

Q. You wouldn't say that there wasn't a bulletin board in there? A. No, I couldn't say that.

Q. You don't know whether there was one there or not? A. No.

Q. Did you ever have any interviews with Mr. Maxwell regarding assignment to the job as a Non-Pilot Navigator?

A. Well, in a hazy sort of way, yes.

Q. I realize it was some time ago, but can you fix the date in any way?

The Court: Approximately, as near as you can.

A. Well, somewhere around 1936 or 1937 is about as close as I can go.

Q. (By Mr. Athearn): 1936 or '46? [128]

A. 1946,

Q. 1946? A. That is right.

Q. That was with Mr. Maxwell, did you say?

(Testimony of John Anderson Hrutky.)

A. No, with a Mr. Campbell was the man I talked to at the time.

Q. What was Mr. Campbell's position at the time? A. Chief Pilot.

Q. And can you recall generally what was said?

A. Oh, there was some discussion going on to the effect that perhaps one day the professional navigators as such would be discontinued and would we like to transfer to another department.

Q. That was what Mr. Campbell said to you, is that? A. Yes.

Q. And what did you say to that?

A. Well, I told him I would like to get back in the Communications Department.

Q. Then what happened?

A. That is about all. That is about the last I heard of it.

Q. Did you ever formally apply for a job in the Communications Department after that interview and until November of 1948?

A. No, but I thought it was pretty well understood that that is what would happen, I would revert to the Communications Department upon my termination in the Operations Department.

Q. But you didn't formally request such a transfer? [129] A. No.

Q. Now, you have a brother by the name of Theodore Hrutky, do you not?

A. That is right.

Q. Do you know about what time he went to work for Pan American Airways, what year?

(Testimony of John Anderson Hrutky.)

A. 1936.

Q. That was the same year you went to work, wasn't it? A. A year ahead of me.

Q. Oh, he was a year ahead of you, was he, 1936?

A. That is right.

Q. You came in 1937? A. That is right.

Q. What kind of a job did he have with the Company?

Mr. Leonard. This is objected to on the ground it is incompetent, irrelevant and immaterial.

Mr. Athearn: Your Honor, they raised the question of this gentleman yesterday, and we are going to show a parallel instance. I am going to show it isn't parallel.

The Court: Objection overruled. Proceed.

Q. (By Mr. Athearn): What kind of job did he have when he went on?

A. I believe he started as apprentice operator.

Q. He later worked up to Flight Radio Operator? A. Yes. [130]

Q. And had about the same kind of job that you did in 1941?

A. No, in 1941 I was Navigator and he was still in Communications.

Q. Did he later become a Navigator?

A. I believe so.

Q. Both of you were Flight Radio Officers, and then you became a Navigator and then he became a Navigator, is that right.

A. That is right.

(Testimony of John Anderson Hrutky.)

Q. He went to work first, I think you said, in 1936? A. Right.

Q. Then——

The Court: How did you get ahead of him?

A. He got ahead of me, sir. I mean, he started before I did.

The Court: In 1936 and you started in 1937?

A. That is right.

The Court: But you went into Navigation first?

A. Yes.

Q. (By Mr. Athearn): I will direct your attention to page 3 of Defendant's Exhibit M, for identification, and particularly to line No. 68 where it reads "Hrutky, T. M.," and under the column "Seniority Date," "3/29/40." Is that your brother?

A. Yes, but the date is in error.

Q. I see. In other words, March 29, 1940, is not the date he went to work for the Company?

A. Oh, no, [131]

Q. Do you know whether he was working as a Navigator on November 19, 1946?

A. 1946? November? I think he went up to Seattle in the spring of 1946.

Q. He had gone back to work as a Flight Radio Officer in 1946, hadn't he? A. Yes.

Q. In other words, when this exhibit came out he was back on the Active List because he was then an FRO, isn't that right?

Mr. Leonard: Just a minute, that calls for the witness's conclusion and opinion.

The Court: If he knows he may answer.

(Testimony of John Anderson Hrutky.)

Q. (By Mr. Athearn): Do you know if he was then an FRO? A. What time?

Q. November 19, 1946?

A. Well, I believe he said he was at that time, yes.

Mr. Leonard: There must be better evidence than this, Mr. Athearn.

Mr. Athearn: We will. I just wanted to make sure that the plaintiff knows it, counsel.

Q. You don't know how that date March 29, 1940, got written after his name there, do you?

A. Looks wrong to me. If he started a year ahead of me he couldn't be in 1940.

Q. Yes, he would be way up here, maybe 10th or 11th on the [132] List, rather than 67th on the List, wouldn't he? A. That is right.

Mr. Leonard: That is argumentative, if Your Honor please.

Mr. Athearn: I won't follow it any further. I will follow it up later.

Q. I believe you stated that during the year 1949 you did not have any income? A. Right.

Q. You didn't have any job? A. No.

* * *

The Court: Did you earn anything during that period at all?

A. No.

Q. (By Mr. Athearn): You were building a house for yourself during that year, weren't you?

A. A few months, yes.

(Testimony of John Anderson Hrutky.)

Q. During the time you were building a house, you weren't [133] looking for a job, were you?

A. Well, I was waiting to be called.

The Court: Where were you building a house?

A. In Oakland, sir.

The Court: Whereabouts?

A. On Michigan Avenue.

The Court: How many rooms?

A. Five.

The Court: Did you build it all yourself?

A. Yes, sir.

The Court: Indicates you are industrious, that is all. Did you ever have anyone helping you?

A. No, sir.

The Court: What were you doing with the house?

A. It is still sitting there waiting to be completed. I haven't had time or funds to complete it.

Q. (By Mr. Athearn): We have a document here that has been marked Defendant's Exhibit I for identification, and there are four letters, each dated March 4, 1949—no, the one is dated March 3, 1949. I ask you whether that is a copy of the letter you received? A. Yes.

Q. That is a letter signed by Delvin E. Axe, Communications Superintendent? A. Right.

Q. In the letter he states, "In the event you are still interested in a position in our Communications Department, we request that you call at this office for discussion of these openings." Did you ever call in in response to that letter? A. Yes.

(Testimony of John Anderson Hrutky.)

Q. What happened at the interview?

A. Well, in the interview the position was described as being temporary, a salary of approximately \$300 a month, and I declined to accept the offer because it wasn't anything what we had been led to expect we would get.

Q. What kind of job was it? What was it doing?

A. Radio operating.

Q. It was a ground radio operator's job?

A. Right.

Q. Located where?

A. In Los Angeles, I believe.

Q. You had been a ground radio operator when you first went to work for the Company, had you not?

A. True.

Q. You declined this offer of a job?

A. Well, just simply on account of principle, not necessarily because of that particular job.

Q. As a matter of principle you would rather earn nothing than take this job, is that right?

A. Not necessarily. [135]

Mr. Leonard: Objected to on the ground it is argumentative.

The Court: What did you mean when you said you wouldn't accept it on account of the principle involved?

A. I meant that according to our contract with the Company we were informed that we would be reinstated without any loss in any of our privileges which we had earned, and I felt that having our salary chopped in half and having no security what-

(Testimony of John Anderson Hrutky.)

soever or any sort of seniority list, temporary job, wasn't anything near what we had expected.

The Court: It wasn't attractive to you at that time? A. That is right.

The Court: All right, proceed.

Q. (By Mr. Athearn): \$300 a month was more than you were receiving when you left the Communications Department, was it not?

A. I am not sure.

Q. Isn't it a fact you were getting about \$250 at most, then? A. Possibly. I am not sure.

Q. So this was a better job than you left in Communications, was it not?

A. Well, at that time \$250 a month was worth more than \$300 a month now.

Q. And you did not——

A. So that is debatable. [136]

Q. You did not desire to mitigate the damages, reduce the damages you were suffering from lack of a job by taking a \$300 a month job, is that it?

A. Well—well, we thought that by accepting—rather, I thought by accepting such a job that I would in fact wash my hands of any contract that I had with the Company before.

The Court: What is the date of that?

Mr. Athearn: March 3rd, 1949.

Q. 1949, was the year you earned no money at all? A. Right. Yes.

Q. Did you ever apply for another job with another airline after November, 1948?

A. Trans-Ocean.

(Testimony of John Anderson Hrutky.)

Q. Did you ever apply for a job with the Flying Tigers airline? A. No, not during 1949.

Q. Did you ever apply with the Flying Tigers at any time after November 15, 1948, until now?

A. Flying Tigers? No.

Q. Did anyone ever tell you there was a job available there for you? A. Yes.

Q. Who did that?

A. Mr. Poindexter called me one day and said that perhaps I might be interested in something that was coming up. Well, it entailed leaving the United States for a period of a year, and [137] it looked like a pretty good proposition except it was temporary. I mean, I couldn't look forward to more than a year's employment at most.

Q. Mr. Poindexter? Who is he?

A. Well, he was Chief Flight Radio Officer, I believe, for Pan American.

Q. For Pan American Airways, the defendant, is that right? A. Yes.

Q. Can you tell me when he called you, approximately? .

A. I think it was in January of this year.

Q. January of 1950? A. Right.

Q. And he told you there might be a job available with the Flying Tigers?

A. Yes, but at the same time I told him that I had already lined up the job which I presently hold.

Q. So you never applied to the Flying Tigers?

A. Right.

(Testimony of John Anderson Hrutky.)

The Court: Anything said about compensation with the Flying Tigers?

A. The matter was brought up how he thought that I should be able to earn approximately \$800 a month.

The Court: What is that?

A. \$800 a month.

The Court: Foreign mission, or something of the kind? [138]

A. Yes, sir. It would evidently be based in Europe somewhere, and I understand there is a Holy Year in progress, and I believe the Flying Tigers had some sort of contract to fly pilgrims into the Holy Land.

The Court: I see. All right.

Q. (By Mr. Athearn): Now, this job that you mentioned on the tuna boat, you took that in January of this year? A. Right.

Q. That was on the basis of a quarter share, I believe you said. A. Right.

Q. I believe you said that on this most recent three months' voyage a full share man would get about \$2,000, you estimate?

A. That is right, with 225 tons of fish it would net about \$2,000 per full share man.

Q. And you hope sometime to be a full share man, don't you? A. Right.

Q. How long do you think that will take you?

A. Well, could take a year, but I hope it will be sooner.

Q. And a full share man earns from this par-

(Testimony of John Anderson Hrutky.)

ticular voyage approximately \$2,000 over and above his room and board, does he not? A. Right.

Q. He comes back to port with \$2,000 clear?

A. Yes, somewhere around that. [139]

Q. How many voyages can a full share man hope to make during the year?

A. Oh, three or four.

Q. If he made four, he would make \$8,000 over and above room and board, would he not?

A. Right.

The Court: How do you get that status in a year? What happens?

A. I am not sure, exactly, Your Honor, except that your allowance is increased by quarterly share amounts. For instance, you start at a quarter share on the first trip, and then perhaps a second share the second trip, and so forth.

* * *

Redirect Examination

By Mr. Leonard:

Q. Mr. Hrutky, you were asked whether you had occasion the latter part of 1946 or early part of 1947 ever to be in Mr. Poindexter's office. I want to show you, in that connection, Defendant's Exhibit N for identification, and ask you if you ever saw that document before you saw it in this courtroom yesterday?

Mr. Athearn: We will object to that as being asked and answered. He said on direct examination he had never seen it. [140]

(Testimony of John Anderson Hrutky.)

Mr. Leonard: Oh, all right, if the record so shows I am satisfied.

Q. During the latter part of 1946 and early part of 1947 where was Mr. Poindexter's office located?

A. I believe it was in the Terminal Building.

Q. And where were the Navigators' quarters located at that time?

A. Oh, in the Administration Building.

Q. Those are separate and distinct buildings, are they? A. Yes.

Q. You were in the Navigators group at that time, of course? A. That is right.

Q. Your duties took you into the Navigators quarters? A. That is right.

Q. You might, for a social chat, drop into Mr. Poindexter's? A. Right.

Q. Because you had known him from the time you were in the Communications Group?

A. Right.

Q. Did Mr. Poindexter ever call your attention to that Seniority List? A. No.

Q. Any time you were in his office he didn't say, "Take a look at the bulletin board, there is something there that might interest you?" [141]

A. No.

Q. Or might concern you? A. No.

Q. He never said that? How about the interview with Mr. Campbell about which you just testified?

* * *

Q. (By Mr. Leonard): After your interview

(Testimony of John Anderson Hrutky.)

with them did Mr. Campbell or any other official of the Company ever formally offer you a transfer or assignment back to Communications? A. No.

Q. It was just a loose kind of discussion about sometime the navigation function would be terminated and you indicated you would like to go back in Communications? A. Yes.

Q. Did he ever tell you when that happened you could go back into Communications? A. No.

Q. Did he suggest to you you couldn't go back into Communications? A. No. [142]

* * *

Q. Did he suggest to you when the navigation function was terminated you would be severed from the Company? A. No.

Q. You never formally received an order or direction from the Company that you would be transferred over? A. No.

Q. Or request that you go over? A. No.

Q. What does your family consist of, Mr. Hrutky? A. A wife and three children.

Q. Counsel showed you a letter from Mr. Axe to you dated March 3, 1949, and you say as a result of the receipt of that letter you did go to see Mr. Axe and have an interview with him about the projected job, is that right? A. Yes.

Q. At the time you transferred out of the Communications Department and into the Navigation in 1941, were you engaged in ground communications or in flight communications?

(Testimony of John Anderson Hrutky.)

A. I had just finished a tour of duty on Canton Island and would normally go right back on as Flight Radio Officer.

Mr. Athearn: I object, that isn't an answer to the question. The question was, what were you doing in 1941?

Mr. Leonard: He said he was engaged in a tour on Canton Island.

A. I was Flight Radio Officer temporarily assigned to ground duty. [143]

Q. (By Mr. Leonard): The job Mr. Axe proposed at the time of this interview which you had in March, 1949, was that a job as a Flight Radio Officer? A. No.

Q. In 1941 at the time you transferred over, were you stationed, based, in San Francisco or in Los Angeles? A. San Francisco.

Q. Was your home in San Francisco or in the Bay Area, at least? A. Right.

Q. Was the same situation true in 1949 when you saw Mr. Axe, your home was here in the Bay Area? A. Yes.

Q. The job he was talking about, was that a job in San Francisco or Los Angeles.

A. In Los Angeles.

Q. In 1941, your job as Flight Radio Officer, was that temporary or permanent assignment with the Company? A. Permanent assignment.

Q. Was this job Mr. Axe offered you a permanent job or temporary job? A. Temporary.

(Testimony of John Anderson Hrutky.)

Q. Was there any indication what would happen after that temporary job was completed?

The Court: His testimony was it was only a temporary job for a year. That is the ultimate fact.

Mr. Leonard: All right.

Q. After you had this interview with Mr. Axe—this, incidentally, was after the complaint in this case had been filed, isn't that right?—you received a letter from Mr. Axe to interview him?

A. Yes.

Q. Then did you come to my office and discuss it with me? A. Yes.

Q. Then as a result of that discussion, do you remember I prepared a letter which we sent to the Company? A. Right.

Q. That document has been marked Defendant's Exhibit K for identification, and does that document state the reasons why you felt you were unable to accept the proposed job that Mr. Axe was discussing?

The Court: If you prepared it, we will assume everything has been taken care of.

Mr. Leonard: Thank you very much, Your Honor. I tried not to overlook anything.

Q. With respect to the conversation you had with Mr. Poindexter in January, 1950, in which he talked to you about a job with the Flying Tigers, that organization wasn't with Pan American Airways?

A. No.

Q. It was with another company, that is, as you

(Testimony of John Anderson Hrutky.)

told us, not [145] based in San Francisco but based in Europe? A. Right.

Q. Furthermore, if you took that job with the Flying Tigers, would you have had seniority and retirement benefits which accrue to employees under the Pan American Airways situation? A. No.

Q. You would have gone into the Flying Tigers as a brand new employee? A. Yes.

Q. With whatever arrangements they have for seniority and retirement, if they have any?

A. Yes.

Q. Do you know whether they have any?

A. No. [146]

* * *

STANLEY CUMMINGS

a plaintiff herein, called as a witness on his own behalf, sworn.

The Court: State your full name please.

A. Stanley Cummings.

The Court: Where do you live?

A. Carmel.

The Court: Your business or occupation?

A. I also have a launderette like Mr. Charman.

The Court: How long have you been in that business?

A. Approximately a year. Just about a year.

The Court: How many units have you got?

A. Twenty washing machines.

The Court: How is business?

A. Oh, it is picking up.

(Testimony of Stanley Cummings.)

The Court: I can't conceive of anyone down in Carmel doing their own washing.

A. I would like to correct that. I live in Carmel. I have a launderette in Monterey, adjacent town.

The Court: All right, proceed.

Direct Examination

By Mr. Leonard:

Q. How old are you, Mr. Cummings?

A. Forty-two.

Q. What was your schooling, education?

A. High school.

Q. After high school, what did you do? [147]

A. Started to study radio.

Q. Where? A. In Los Angeles.

Q. How long did you study radio?

A. The first session, approximately a year, to get my first license.

Q. What license was that?

A. That was a second-class radio-telegraph license. Following that I went to sea for a short time. After getting the necessary experience I came back to Los Angeles and took another training course which qualified me to get a first-class radio-telegraph license. I went to sea again. Again after getting experience at sea, I again came ashore to study and got a first-class radio-telephone license.

Q. These courses of study and the sea experience, with respect to that matter, you were in Court yes-

(Testimony of Stanley Cummings.)

terday when Mr. Charman testified generally about the nature of the studies and duties involved?

A. Yes.

Q. What he had to say with respect to experience in that regard applies equally to you, without repeating it in detail?

A. Yes, that is true.

Q. When you finally went to work, did you for Pan American Airways?

A. Well, ultimately. I had another job in the meantime.

Q. What other experience in radio did you have before you [148] went to work for Pan American?

A. As transport radio officer I was employed by Richfield Oil Company, Moore-McCormack Steamship Company, then went to work for TWA Airlines.

Q. So that your first employment as radio man at an airfield was not with Pan American, but you had experience with TWA?

A. That is right.

Q. How long were you employed by TWA?

A. Approximately one year.

Q. Generally, what were your duties there?

A. Ground radio operator maintaining communications on the ground radio circuit by radio-telegraph, and communications with airplanes in flight with radio-telephone.

The Court: When was that?

A. In 1935.

(Testimony of Stanley Cummings.)

The Court. Bring us up to the present time from that time on, for the purpose of the record.

A. I was employed with TWA in Albuquerque, New Mexico, during the latter part of 1935. I heard Pan American Airways was going to inaugurate a new division spanning the Pacific Ocean, and I was very interested in joining that enterprise. I applied for employment and was so employed in December, 1935, with Pan American Airways.

The Court: Go ahead and bring us up to the present date. You were employed in 1935, then what happened? [149]

A. Just right up to the present date?

The Court: Yes.

A. I was employed by Pan American.

Mr. Leonard: I was going to say with counsel's consent we are prepared to enter into a stipulation with regard to the precise dates.

The Court: All right, that is what I was wanting.

Mr. Leonard: I will read what Mr. Athearn is prepared to stipulate with me on, Mr. Cummings, and you say if this is substantially your employment. He was first employed as Assistant Radio Operator on December 30, 1935; reclassified as Flight Radio Officer July 1st, 1938; that you were reclassified as a Non-Pilot Navigator on February 1, 1941; that you were reclassified as an Assistant Chief Navigator on June 15, 1945; that you were reclassified as Check Navigator on March 16, 1947; that you were reclassified as Non-Pilot Navigator

(Testimony of Stanley Cummings.)

on March 23rd, 1948; that you were terminated on November 15, 1948.

Mr. Athearn: We will so stipulate.

A. That is correct.

The Court: The record so shows.

Mr. Leonard: For the record, Your Honor, may I make, consistent with the record up to this time, an offer of proof that during this period of time Mr. Cummings had 4,446 hours as a Non-Pilot Navigator and 2,005.10 hours as Flight Radio [150] Officer, or a total number of flying hours of 6,451.10.

Mr. Athearn: We will repeat our objection to the materiality.

The Court: Objection sustained.

* * *

Q. Mr. Cummings, I believe there is one new classification here that did not appear in either Mr. Charman or Mr. Hrutky's employment history. That is, for the period from June 15, 1945 to March 16, 1947, something short of two years, you were classified as Assistant Chief Navigator.

A. Yes.

Q. Will you tell us what the duties and functions of an [151] Assistant Chief Navigator, are, please.

A. Generally, supervisory, administrative over the Navigators involved in the airline; to assist the Chief Navigator and carrying out his policies; answering correspondence; investigating new types of equipment; in general, see the Chief Navigator's

(Testimony of Stanley Cummings.)

policy is carried out while he was on flight or rest periods or vacation.

Q. With respect to the Pacific-Alaska Division of the Company, which I think we will agree is the only division with which we are concerned here, how many Chief Navigators were there?

Mr. Athearn: We object to that.

Mr. Leonard: I think the Court has a right to know and we have a right to show what the position—what position this man had and where he was.

The Court: You have already established what his position was.

Mr. Leonard: I am simply trying to develop what the functions and duties are. We will show a Chief Navigator is fairly highly placed.

Mr. Athearn: We are ready to stipulate all these men are highly qualified, and we have no objection to their background.

The Court: And what's more, they needn't apologize to anyone. They are outstanding men.

Mr. Leonard: That is right. I don't see why counsel should object to the fact. [152]

The Court: The fact was admitted. There is no necessity of proof.

Mr. Leonard: If counsel presses the objection, all I wanted to show is the fact that this particular man, as distinguished from some of the others, has this one classification of Assistant Chief Navigator, and I wanted Your Honor to know what that meant.

The Court: Are you asking any more for him on that basis than for your other clients?

(Testimony of Stanley Cummings.)

Mr. Leonard: No, Your Honor.

The Court: Then we are ready to proceed.

Mr. Leonard: I will accede to Your Honor's ruling.

The Court: We will all agree you are the best man.

A. Thank you, sir.

Q. (By Mr. Leonard): Mr. Cummings, in connection with your reclassification on February 1st, 1941, to Non-Pilot Navigator, you also received the memorandum of January, 1941, which has been offered in evidence herein? You are familiar with it, the memorandum Mr. Hrutky and Mr. Charman received, that is right, is it not?

A. Yes, I received that.

Q. That is dated about ten days prior to the time you actually were reclassified?

A. That is right.

Q. Then you assumed your navigational duties and functions in [153] the Navigation Department?

A. Yes.

Q. Thereafter, while you were so functioning, you also received the letter, document referred to as Plaintiff's Exhibit 1 for the sake of the record?

A. Yes.

Q. Thereafter, and while you were functioning in the Navigation Department, you were a recipient of this document, Plaintiff's Exhibit 2, dated April 22, 1943?

A. Yes.

Q. After the receipt of that document you con-

(Testimony of Stanley Cummings.)

tinued to function in the Navigation Department?

A. Yes.

Q. And you did so until your termination in November, 1948? A. Yes.

Q. Did you also receive one of the telegrams of November 8, 1948, facsimile of which has been introduced in evidence herein as Plaintiff's Exhibit 3?

A. That is the original sent to me.

Q. Oh, yes. This has your name on it. Was that the first notice you had that your services with the company were terminated?

A. Yes.

Q. Thereafter, did you also make a written request to the Company asking that you be assigned to the Communications [154] Department?

A. Yes, I did.

* * *

Mr. Leonard: If Your Honor please, pursuant to the suggestion made by Your Honor prior to the recess, Mr. Athearn and I have gone over some documents and had them marked for identification. I think we are prepared to stipulate they may be admitted into evidence, subject to objections heretofore made with respect to the materiality of identical document in connection with the other proof, so that, first, I would offer in evidence what has been marked Plaintiff's Exhibit 8 for identification, a communication from the plaintiff Cummings to the Manager of the Communications Department of the Company dated December 2nd, 1948.

(Testimony of Stanley Cummings.)

Mr. Athearn: No objection.

The Court: That may be admitted and marked, next in order. [155]

(Whereupon letter above referred to was admitted into evidence as Plaintiff's Exhibit 8.)

Mr. Leonard: Next I would offer in evidence document marked Plaintiff's Exhibit 9 for identification, which is a letter dated December 6, 1948, to plaintiff Cummings from Mr. Axe, the Manager of the Communications Department of the defendant Company.

Mr. Athearn: No objection.

The Court: It may be admitted and marked next in order.

(Whereupon letter above referred to was admitted into evidence as Plaintiff's Exhibit 9.)

Mr. Athearn: Then, Your Honor, we have a series of exhibits here; Communication with a memorandum dated November 5, 1940, signed by S. Cummings, marked Defendant's Exhibit P for identification. We move its admission.

The Court: Admitted next in order.

(Whereupon communication above referred to was admitted into evidence as Defendant's Exhibit P.)

Mr. Athearn: A memorandum dated November 7, 1940, signed J. F. Schwella, marked Defendant's Exhibit Q for identification.

(Testimony of Stanley Cummings.)

Mr. Leonard: No objection.

The Court: That may be admitted next in order.

(Whereupon memorandum above referred to was admitted into evidence as Defendant's Exhibit Q.)

Mr. Athearn: Next a photostatic copy of a check in the [156] sum of \$2,129.56, payable to Stanley Cummings, marked Defendant's Exhibit R for identification, and we move its admission.

Mr. Leonard: Objected to, if Your Honor please, on the ground it purports to result from an arbitration, and we urge our grounds as to inadmissibility and immateriality with respect to the contract issued between these parties and the defendant.

The Court: Objection overruled. It will be admitted and marked next in order.

(Whereupon photostatic copy of check above referred to was admitted into evidence as Defendant's Exhibit R.)

Mr. Athearn: Next, a photostatic copy of a check in the sum of \$1,923.87, payable to John A. Hrutky, marked Defendant's Exhibit S for identification. We move its admission.

Mr. Leonard: Same objection as to Exhibit R, if Your Honor please.

The Court: Same ruling. It will be admitted and marked, next in order.

(Whereupon photostatic copy of check above referred to was admitted into evidence as Defendant's Exhibit S.)

(Testimony of Stanley Cummings.)

Mr. Athearn: Next, a photostatic copy of a check in the sum of \$204, payable to John A. Hrutky, marked Defendant's Exhibit T for identification. We move its admission.

Mr. Leonard: Same objection.

The Court: Same ruling. It will be admitted and marked. [157]

(Whereupon photostatic copy of check above referred to was admitted into evidence as Defendant's Exhibit T.)

Mr. Athearn: Finally, a photostatic copy of a check in the sum of \$2,176, payable to J. F. Schwella, marked Defendant's Exhibit U for identification. We move its admission.

Mr. Leonard: Same objection.

The Court: Same ruling. It will be admitted and marked.

(Whereupon photostatic copy of check above referred to was admitted into evidence as Defendant's Exhibit U.)

Q. (By Mr. Leonard): Now, Mr. Cummings, since November 15, 1948, have you made any effort to secure employment?

A. Yes, I have.

Q. Will you tell the Court what efforts you have made and with what success?

A. I corresponded with TWA Airline, United Airline, and Northwest Airlines, applying for position as either Navigator or Flight Radio Officer, and

(Testimony of Stanley Cummings.)

the answers in all cases—I include a list of qualifications for such employment—in all cases being I was over age.

Q. Do you recall what the maximum age for any employment was in those classifications?

A. They vary with individual airlines from 29 to, I believe, a maximum of 33, to the best of my knowledge.

Q. What other efforts did you make to secure employment aside from applying to the airlines you have mentioned? [158]

A. After failing that, I thought of going into business for myself and opened that launderette.

Q. When did you open it?

A. In March, 1949.

Q. What were your earnings from the operation from your launderette last year?

A. I believe I reported on my income tax a figure of \$1,323. Something of that sort, anyhow. \$1300 and something.

Q. That represented your net income from the operation of the launderette, did it?

A. Yes, sir, that is correct.

Q. That represents also, I take it, something of a capital investment by you? You had to invest money into that launderette, did you not?

A. Yes, all I could lay my hands on.

Q. So that in addition to the labor and time you spent on the launderette, you invested capital in it?

A. Yes.

(Testimony of Stanley Cummings.)

Q. Now, do any other members of your family work in the launderette or assist you?

A. My wife, from time to time; not regularly.

Q. So that \$1300 represents not only the capital of yourself, labor and time, but also your wife's—a portion, at least, of your wife's?

A. What she spent on the place, yes. [159]

Q. Incidentally, what does your family consist of?

A. A little boy and little girl.

Mr. Leonard: I believe that is all, if Your Honor please.

Cross-Examination

By Mr. Athearn:

Mr. Leonard, will it be stipulated that on November 19, 1946, none of the plaintiffs was in a ground position involving supervision of Flight Radio Officers?

Q. That is correct, is it?

A. That is correct.

Mr. Leonard: Yes, it will be so stipulated.

Mr. Athearn: As to all the plaintiffs?

Mr. Leonard: That is correct.

Q. (By Mr. Athearn): In 1946 did you ever have conversation with Mr. Maxwell regarding your return to the Flight Radio Officers group?

A. Yes, I believe that I did.

Q. And Mr. Maxwell was at that time what?

A. I believe his title was Operations Manager.

Q. For the defendant?

(Testimony of Stanley Cummings.)

A. Yes, for the defendant.

Q. And what did he say to you?

A. He said it was foreseeable that in the immediate future the position of Non-Pilot Navigator would be abolished.

Q. Anything else?

A. I am trying to think what the conversation was. First he [160] brought that point up. He informed me that there was in progress at that time a training and placement program, and advised as to the nature of that training and placement program. Shall I elaborate?

Q. Yes, go ahead, as near as you can recall.

A. The majority of the navigators hired, or uniformly, were hired strictly as temporary employees. The offer of employment was stated—the offer stated upon expiration of the emergency and Navy contract these men would be dismissed as Navigators, but every effort would be made to retain them in the Company in other positions. The training and placement program noted by Mr. Maxwell of Pan American Airways was in line with this statement. They were to have been going to try to qualify all of these temporary navigators employed during the war to take some other position with the Company.

Q. This applied to the men who had been Flight Radio Officers and who had been Navigators, didn't it?

A. No, sir, because we had already qualified as Flight Radio Officers, had other skills which could be utilized.

(Testimony of Stanley Cummings.)

Q. To make a long story short, didn't Mr. Maxwell urge all of you Non-Pilot Navigators who had been FROs to get back into the FRO group?

A. No sir.

Q. He didn't tell you it was for your best interests to do so as soon as possible? [161]

A. No, I don't recall that statement being made. I felt when the position of Navigator was abolished I would then return.

Q. He didn't tell you to hurry up and do the same thing that the others had done and go back to the FRO group?

A. I recall no such statement.

Q. Are you sure he didn't say it?

A. I wouldn't swear to it.

Q. He may have said it?

A. Possibly, but I don't recall it.

Q. Did you ever talk to Mr. Poindexter about the same subject?

A. Undoubtedly we discussed it from time to time, yes.

Q. Mr. Poindexter's position at that time was—

A. As he is now, Chief Flight Radio Officer for Pan American Airways.

Q. This was in 1946, approximately?

A. I had my discussion with them between 1941 and 1949. I can't specify exactly to the date it occurred.

Q. In 1946 did not on several occasions Mr. Maxwell urge you to hurry up and get back into the FRO group?

(Testimony of Stanley Cummings.)

A. No, sir, not that I recall.

Q. Didn't he tell you that there were openings at that time and you better grab them?

A. He made me no offer of employment as a Flight Radio Officer, no.

Q. Didn't he tell you there were openings and you better [162] grab them?

A. I don't recall that he did. I am sure if he did I would have done it.

Q. Then you don't think he did say that?

A. To the best of my recollection, no, sir, I don't believe he did.

Mr. Athearn: No more questions.

Mr. Leonard: I have just one or two, if Your Honor please.

Redirect Examination

By Mr. Leonard:

Q. With respect to those temporary navigators hired during the war and subsequently laid off, had any of those men been Flight Radio Officers for the Company before the war?

A. No, sir, not to my knowledge. [163]

* * *

Q. (By Mr. Leonard): During any of your conversations with Mr. Maxwell and Mr. Poindexter that you have testified to on cross examination, did either of those gentlemen inform you that it had been found no longer necessary to assign you as a Navigator?

(Testimony of Stanley Cummings.)

A. No. To the contrary.

Q. Did either of those gentlemen in the course of those conversations inform you that the position of Non-Pilot Navigator was being abolished in 1946 or 1947 when you talked to them?

* * *

A. Yes, I understand it. Yes, I believe in 1946, they anticipated in the very near future, upon expiration of the Navy contracts, these jobs would be abolished.

Q. They anticipated it would be abolished at some future date?

A. Yes.

Q. But at the time you talked to them did they say the job was [165] abolished as of now?

A. Oh, no.

Q. As a matter of fact, the position wasn't abolished until November 15, 1948, as the result of that Arbitration Board?

A. Well, in 1946 they had dismissed—

Q. I am talking about classification. The classification continued in effect until the Arbitration Board, isn't that right?

A. Yes.

Q. And you and the other plaintiffs in this case, were, in fact, assigned duties as Navigators up until the time you received the telegrams following the Arbitration Board, that is a fact, isn't it?

A. Yes.

Q. Business was in existence and you men were

carrying on your duties as Navigators until that time?

Mr. Athearn: If the Court please, I think this is leading.

Mr. Leonard: Is there any question about it? Isn't it clear?

Mr. Athearn: Abundantly to me, counsel.

Mr. Leonard: All right, I will accept counsel's word for the record. [166]

* * *

JOHN FRANKLIN SCHWELLA

plaintiff herein, called as a witness on his own behalf, sworn.

The Court: Your full name, please?

A. John Franklin Schwella.

The Court: Where do you live?

A. 343 McKendre, Palo Alto.

The Court: What is your business or occupation?

A. I operate a service station.

The Court: How long have you operated the service station?

A. Since January, 1949.

The Court: All right proceed.

Direct Examination

By Mr. Leonard:

Q. Mr. Schwella, what is your age?

A. Thirty-six.

Q. What does your family consist of?

A. Wife and two children.

(Testimony of John Franklin Schwella.)

Q. What is your formal education?

A. High school and two years of radio communications.

Q. Where?

A. Frank Williams Trade School in Los Angeles.

Q. After you completed the two year course did you obtain employment as a radio operator?

A. Yes. [167]

Q. With whom?

A. I went to sea on two different tuna boats and then on a steam schooner.

Q. How long did you go to sea and what certificates or licenses did you have?

A. I went to sea for a little over a year, and upon the termination of that obtained a first class radiotelegraph license, in addition to the first class radiotelephone I already had before.

Q. And your duties as radio operator at sea were substantially the ones described by Mr. Charman earlier in the case? A. Yes.

Q. And was your training substantially the same as his? A. Yes.

Q. After you went to sea what did you do?

A. I had a short time job in a screen factory waiting for another assignment. I worked in a radio laboratory for about three months, then got a job as radio operator with an airline.

Q. Which airline?

(Testimony of John Franklin Schwella.)

A. Grand Canyon Airline, Boulder City, Nevada.

Q. How long did you keep that job?

A. Approximately one year.

Q. What was your classification there?

A. At the end I was chief radio operator and dispatcher.

Q. That was for the entire line? [168]

A. Yes.

Q. And after that did you go to work for the defendant Pan American?

A. I went to work for the defendant, Pan American Airways, November 16, 1937.

Q. Mr. Schwella, counsel is prepared to stipulate with me your employment history with the defendant, and you listen and see if this is correct as near as you can recall: You first went to work for the Company as Assistant Flight Operator on November 16, 1937; that you were reclassified as a Flight Radio Officer on April 1st, 1939; that you were reclassified as Non-Pilot Navigator on July 1st, 1942; that you were reclassified as Check Navigator on March 16, 1947; that you were reclassified as a Non-Pilot Navigator on March 16, 1948; that you were terminated on November 15th, 1948?

A. Yes.

Mr. Athearn: So stipulated.

Q. (By Mr. Leonard): That is substantially correct, is that right? A. Yes.

Q. All right, now, there have already been intro-

(Testimony of John Franklin Schwella.)

duced in evidence as a result of the stipulations, Mr. Schwella, various documents and communications that you addressed to the Company and the Company addressed to you with respect to this transfer from your status in the Communications Department to the Navigations Department. You made the request that is in evidence, and you were transferred and received the same memoranda of January—withdraw that. You didn't receive the memorandum of January, 1941, did you?

A. No.

Q. Because your transfer was at a later date?

A. Mine was in February, 1942.

Q. In other words, just for the record, you were never a recipient of this document which is Plaintiff's Exhibit 1?

A. Not to my knowledge, no.

Q. But you were a recipient, were you not, of the document of April 22nd, 1943, which is Plaintiff's Exhibit 2?

A. Yes.

Q. And the fact is that your transfer from Communications to Navigation occurred at a date between the dates of these two documents, is that right?

A. That is right.

Q. And after you were terminated in November of 1948 you wrote to the Company and requested an assignment in Communications, is that right?

A. Yes.

Q. And I believe that document is already in evidence. It might not be. No, it isn't.

(Testimony of John Franklin Schwella.)

Mr. Leonard: Those documents aren't in evidence, Mr. Athearn. May we stipulate that they may go in, Mr. Schwella's letter to the Company of December, 1948, and the Company's response to him of December 6, 1948?

The Court: They may be admitted and marked next in order.

(Whereupon letter dated December 1, 1948, Schwella to Axe; and letter dated December 6, 1948, Axe to Schwella, were admitted into evidence as Plaintiff's Exhibits 10 and 11, respectively.)

* * *

Q. (By Mr. Leonard): Save and except for the letter you got in 1949 and the interview with Mr. Axe—did you have an interview with Mr. Axe?

A. No, I didn't have an interview with Mr. Axe. I had an interview with Mr. Castleman, who was one of his assistants.

Q. You heard the testimony of Mr. Hrutky with regard to the kind of job that was offered or proposed to him? Was a similar job proposed to you?

A. Yes. It was a job in Los Angeles as a ground Radio Operator with a station I believe the Pan American Airways was building. They anticipated, however, in about three months the operation would be taken over by Aeronautic Radio Incorporated. I was informed that the practice of Aeronautic Radio Incorporated at that time was to take over the existing personnel. However, I was given no as-

(Testimony of John Franklin Schwella.)

insurance that they would take them over at the end of that time. The only thing I had to look forward to was possibly continue as Island Attention on Wake or some other Pacific point.

Q. So that as you understood and as a result of the interview which followed the letter of March, 1949, the job was Ground Radio Operator at Los Angeles for three months, then another group was going to take over, is that right? A. Yes.

Q. And the practice, as you understood it, was that the other group would keep the personnel on?

A. That was their practice, but of course Pan American had no jurisdiction over that.

Q. There wasn't any assurance that they would do that?

A. Not by Pan American.

Q. If they did do that, would you have been entitled to retirement benefits, for example, or any seniority benefits you would have if you continued as a Pan American employee?

A. I don't believe I understand that. [172]

Q. Well, were there any assurances this new group would have the same kind of retirement plan and you would have the same retirement benefits you would have as a Pan American employee?

A. Not to my knowledge, there wasn't.

Q. Since November, 1948, I think you told His Honor you were operating a service station commencing in January, 1949? A. Yes.

(Testimony of John Franklin Schwella.)

Q. Did you make any effort to obtain any employment as radio operator or navigator?

A. Yes, I applied for Army Transport Service as a maritime radio operator, and also with the United States Employment Service for a job as navigator or radio operator, and sometime in the spring of 1949 I was offered a job as a maritime radio operator, but at that time I was operating the service station.

Q. Up until the time you got in the service station you didn't receive any offer of employment, either radio or navigation, is that it?

A. Other than the one by Pan American.

Q. The one which you just described. How much did you earn in the operation of the service station in 1949? A. Approximately \$5,200.

Q. Did that represent your own labor and time as well as capital you had invested in the service station?

A. Yes, and also my wife does a portion of the work in the accounting and bookkeeping. [173]

Q. How much capital did you have to invest in the service station?

A. I had to invest \$4,000 in the operating fund.

Q. And how much time does your wife spend in connection with your operation of the service station?

A. I would say approximately one to two hours a day.

(Testimony of John Franklin Schwella.)

Q. Every day? A. Yes.

Q. How much time do you spend?

A. I schedule myself, for eleven hours a day, six days a week, and Sundays off; open at 7 and go home usually at 6 or 6:30, with possibly some time off for lunch.

The Court: Where is the station located?

A. Palo Alto.

The Court: Where?

A. Middlefield and Middle Road.

Q. (By Mr. Leonard): So that from what you say, you yourself are putting in 66 hours a week?

A. Yes.

Q. Did all last year?

A. Yes. When I started the station in January, 1949, and for about three or four months I worked those hours plus Sundays because I didn't have any help.

Q. I don't think the record shows—maybe you can tell us—Flight Radio Officers whom it has been testified will earn [174] approximately \$600 a month for the company, what weekly hours do they put in for that salary?

A. I believe the average Flight Officer is limited to 85 hours a month, based on a yearly basis.

Q. And your family consists of what?

A. Wife and two children.

Mr. Leonard: I think that is all, if Your Honor please.

Mr. Athearn: We have no questions.

Mr. Leonard: If Your Honor please, that is the plaintiff's case.

WYATT FRANKLIN FISHER

called as a witness on behalf of the defendant, sworn.

The Clerk: State your full name, please.

A. Wyatt Franklin Fisher.

Direct Examination

By Mr. Athearn:

Q. And your residence, Mr. Fisher?

A. Palo Alto.

Q. How long have you been—you are connected with the Industrial Relations Department of the defendant Company? A. Yes.

Q. How long have you been so connected? [175]

A. Approximately seven years.

Q. That is, since 1943?

A. Since 1943.

Q. Until April, 1944, under what type of employment contracts were the Flight Radio Officers of the defendant's Pacific Division engaged?

Mr. Leonard: That is objected to as calling for an opinion and conclusion of the witness. The contracts would speak for themselves, and the Court would determine what type of contract.

The Court: If he knows.

A. We had oral contracts with the employees

(Testimony of Wyatt Franklin Fisher.)

at that time, and we had formalized salary scale or treatment of wages.

* * *

Q. As I understand, these were oral contracts? As I understand it, Flight Radio Officers for the defendant Company prior to 1944 were engaged on oral contracts? A. Yes.

Q. No written contracts of employment?

A. No.

Q. And I believe you said something about pay scale policies?

A. We had formalized pay scale policies which set forth the [176] starting rate of pay and progress in that pay scale from minimum to maximum, along with the qualifications required to progress from minimum to maximum in the pay scale.

Q. These were not embodied in collective bargaining contracts, I take it? A. No.

Q. Or regular written contracts with individual employees? A. No.

Q. You will confine yourself to the Flight Radio Officers at the present time? A. Yes. [177]

* * *

Q. (By Mr. Athearn): Was the term "seniority" used prior to 1944 in any Company memorandum or data regarding Flight Radio Officers?

A. Yes.

* * *

Q. (By Mr. Athearn): Withdraw the question.

(Testimony of Wyatt Franklin Fisher.)

What type of [178] memorandum used the word "seniority"?

A. Memoranda in publications covering our retirement income plan, group life insurance plan, group life insurance, hospitalization and surgical insurance, and in your company benefits such as vacations, sick leave, and—well, that roughly covers it.

Q. Items such as sick leave, vacations, and so on were given on the basis of seniority?

A. It is computed on length of service with the company.

Q. The term "seniority" then did not refer to seniority lists as in collective bargaining?

A. No.

* * *

Q. (By Mr. Athearn): It related, as I recall, to such matters as promotion, free travel and includes vacations now? A. Yes.

Q. Is there a retirement plan, or was there at the time a retirement plan for Company employees?

A. Yes, the Company's retirement plan was initiated, I think, on March 1st, 1941.

Q. That was based on seniority in the sense you have mentioned? A. Yes.

Q. I have been confining myself, my questions, to a period [179] prior to April, 1944, and in particular Flight Radio Officers. What change occurred in April, 1944, with reference to employment of Flight Radio Officers?

A. I believe the Flight Radio Officers Association

(Testimony of Wyatt Franklin Fisher.)

was recognized as the collective bargaining agent for that group of employees.

Q. That is the first time there had been any union or collective bargaining agent for Flight Radio Officers on this Division?

A. That is right.

Mr. Leonard: May the objection which we made to this testimony at the time we were putting on our case go to it as well now that the defendant is going into this matter of collective bargaining, based upon the theory of the Cabrillo case and the Harrison case that this is totally immaterial?

The Court: Let the record so show.

Mr. Leonard: Thank you.

Q. (By Mr. Athearn): I show you here a document captioned "Agreement between Pan American Airways, Incorporated, and Flight Radio Officers Association," marked Defendant's Exhibit E for identification. Are you familiar with that document?

A. Yes.

Q. And I will show you now particularly page 8 of that document which contains "Agreement for the Establishment of a System Seniority Board for Flight Radio Officers, April 17, 1946." You are also familiar with that agreement? [180]

A. Yes, I am.

Q. Now, in particular referring to paragraph (1) of the agreement of April 17, 1946, which reads: "A Master Company Seniority List shall be prepared showing every Flight Radio Officer employed by the Company on the date of signing of this

(Testimony of Wyatt Franklin Fisher.)

agreement.” You are familiar with that provision?

A. Yes.

Q. As part of your duties did you have anything to do with preparing such a list?

A. Yes, I assisted in the preparation of complete information that we had available in our files showing the employees who either were at the time Flight Radio Officers or had been Flight Radio Officers and still were in the employ of the Company.

Q. I will show you here a document captioned, “Flight Radio Officers’ Group, Pacific-Alaska Division, December 31, 1945,” and ask you whether that is the document you refer to? A. It is.

Q. That is a list prepared, in the preparation of which you participated, which was submitted to the System Seniority Board for Flight Radio Officers created under Defendant’s Exhibit E?

A. That is correct.

Q. Now, to whom was the list sent? To whom did you send the list?

A. We forwarded the list to our local office. I believe it was Vice President Cantwell who was in charge of Industrial Relations. [181]

Q. Do you know what happened to the list then?

A. It was forwarded, then, I understand, to the System Seniority Board to set up the initial seniority roster.

Q. What was this System Seniority Board? How was it composed?

A. It was composed of two members appointed

(Testimony of Wyatt Franklin Fisher.)

by the Company and two members appointed by the collective bargaining agency, the union.

Q. The union in this case was the Flight Radio Officers Association? A. That is correct.

Q. In accordance with the terms of Exhibit E, it was to compile the first Seniority List for Flight Radio Officers?

A. That is right, the first System Seniority Roster.

Q. By "System" you mean a Seniority List that would cover the Atlantic, Latin American and Pacific Alaska Divisions of the defendant Company?

A. That is correct.

Q. So that a Flight Radio Officer would have seniority throughout the entire organization?

A. That is right.

Q. Up to this time there had been no such Seniority Roster, is that correct?

A. That is correct.

Q. In particular calling your attention——

Mr. Athearn: Well, I will offer in evidence the document [182] captioned "Flight Radio Officers Group, December 31, 1945," at this time.

Mr. Leonard: We have an objection, not to the authenticity of the document, but to its materiality on the grounds heretofore stated with respect to all this collective bargaining; and secondly, on the ground that it is developed by the witness' testimony now that this was forwarded to the System Seniority Board which consists of two members appointed by the Company, two members appointed

(Testimony of Wyatt Franklin Fisher.)

by the Flight Radio Officers Union. There is nothing in the record to show these plaintiffs ever authorized them to act for them or on their behalf. [183]

* * *

The Court: I will give him a record on it subject to the objection.

(Roster dated December 31, 1945, was admitted into evidence as Defendant's Exhibit V.)

Q. (By Mr. Athearn): Pointing to page—maybe we can cut this short. This exhibit V which has been offered herein contains up to page 10 what type of Flight Radio Officers?

A. All those who were actively employed at the time as Flight Radio Officers. [184]

Q. Those working on December 31, 1945, as FRO's, is that correct? A. That is right.

Q. Then beginning on page 10, who is there?

A. Employees of the Company who were on December 31, 1945, formerly employed in the Flight Radio Officers Group.

Q. Now, I call your attention to the name "Charman, A. L.," Number 2 on page 10; and on page 11 "J. A. Hrutky"; and on page 12 "Schwella, J. F." Are those the plaintiffs in this case?

A. Yes.

Q. In other words, information regarding the date of their employment, the date of their appointment to FRO Group, and other employment history was submitted through Company channels to the Seniority Board. A. That is correct.

Q. Now, referring to Defendant's Exhibit M for

(Testimony of Wyatt Franklin Fisher.)

identification, captioned "Flight Radio Officers System Seniority List," as of November 19, 1946, can you tell me what that is?

A. This was the initial Seniority Roster produced by the System Seniority Board under our first system contract with the Flight Radio Officers Association.

Q. In other words, that was the list that was compiled by this——

A. And developed from the information contained in that memorandum there.

Q. ——by this memoranda you refer to, Defendant's Exhibit V? [185] A. Right.

Mr. Athearn: And I think it has been stipulated, counsel, that the names of none of the plaintiffs appear on this list of the names with the Seniority Board?

Mr. Leonard: That is correct. I think on neither the list itself nor in Group A nor in Group B, that is right.

Q. (By Mr. Athearn): Is that System Seniority Board still in existence?

A. No, it has been dissolved.

Q. When was it dissolved?

A. I believe it was dissolved after the initial roster was posted for the first 60-day protest period, after which a final roster was issued sometime after the first of 1947, I think it was.

Q. Calling your attention to page 19 of Defendant's Exhibit M, for identification, and in particular Note 5 there reading, "On the inactive list,

(Testimony of Wyatt Franklin Fisher.)

Group B consists of those former Flight Radio Officers who accrued seniority as such but who are no longer accruing seniority due to the nature of the positions held by them since leaving the Flight Radio Officers Group.” You are aware of that provision in the List, I take it? A. Yes.

Q. Is that a uniform or customary provision in Pan American Airways Collective Bargaining Seniority Lists? [186] A. No.

* * *

Cross-Examination

By Mr. Leonard:

Q. Mr. Fisher, I think you stated that when the term “seniority” was used in any Company memoranda or correspondence prior to 1944 it had reference to such matters as retirement plans, vacation, benefits under health plans, sick leave, promotion. Are there any other matters concerning which the term “seniority” was used prior to 1944?

A. Well, it was at one time, it was used basically in connection with length of service with the Company to determine employees total length of service with the Company. It was used to determine times at which he is eligible for service award pins. The length of service was one of the items used in considering promotion, as well as lay-offs as necessity of reduction of force occurred. I don’t know what other specific items I can recall right now.

Q. So that when the communication of January

(Testimony of Wyatt Franklin Fisher.)

21, 1941, which is in evidence as Plaintiff's Exhibit 1, refers at the conclusion of the first paragraph thereof to, "No loss of seniority or advantages" use the word "seniority" in that paragraph [188] referred to whatever advantages the man might have had with respect to promotion, sick leave, health benefits, vacation, retirement plans, and these other matters you mentioned?

A. That is correct.

Q. And the same thing would be true with respect to the use of the word "seniority" in the memoranda—I can't put my finger on it at the moment—of April, 1943, Plaintiff's Exhibit 2?

A. That is correct.

Q. What other factors go into the concept of seniority now since 1944 that weren't contained in it before 1944?

A. I don't know whether I am exactly qualified to answer that, but it is a matter of contractual right given under various collective bargaining agreements. It has been defined by the various agreements what it means.

Q. Whatever additional benefits, if any, there may be in existence over and above those which accrued as the result of seniority prior to 1944, they would be found in these various collective bargaining contracts?

A. That is correct.

Q. With respect to the document which has been admitted into evidence as Defendant's Exhibit V, as I understand it, that is a document that was prepared by the Company for submission to a

(Testimony of Wyatt Franklin Fisher.)

System Seniority Board for the purpose of preparing a Seniority List for Flight Radio Officers pursuant to contracts between the Company and the Flight Radio Officers Union, is that correct?

A. That is correct.

Q. That was submitted, I think, in December, 1945.

A. It was submitted as of December 31, 1945. I think it was forwarded shortly after the first of the year in 1946.

Q. Early in 1946? And the System Seniority Board was one that, as you told us, was made up of two members appointed by the Company and two members appointed by the Flight Radio Officers Union, is that correct?

A. That is as I understand it.

Q. That Flight Radio Officers Union was the one which the Company in April, 1944, had recognized as the collective bargaining agent for its Flight Radio Officers, is that correct?

A. I think it was the successor to it. The original one was a local union for the Pacific-Alaska Division, and this was a national organization, system-wide organization.

The Court: This was what?

A. I think it was a successor organization. It was the same. There were three, as I recall the history of the local organization known as Flight Radio Officers Association. That was the first one.

The Court: And the next?

(Testimony of Wyatt Franklin Fisher.)

A. Then the Flight Radio Officers Association of the Pacific-Alaska Division.

The Court: Next?

A. The Latin American Division and the Atlantic Division [190] effected a system basis and asked to have system-wide bargaining rights.

The Court: And the next?

A. The Flight Radio Officers Association was succeeded by the CIO-TWA.

The Court: And the approximate date?

A. I don't recall. I think it was sometime in 1947.

The Court: When was it, counsel?

Mr. Leonard: I don't know. I will stipulate, if you have the date.

Mr. Athearn: June 30th—according to our records the Flight Radio Officers Association affiliated with the Transport Workers, CIO, on June 30, 1947.

Mr. Leonard: I have no information whatsoever, but I will accept counsel's statement that that is the fact.

The Court: All right.

Q. (By Mr. Leonard): This Flight Radio Officer's Association which had two members on the System Seniority Board to which the document, Defendant's Exhibit V, was submitted, was a group which at the time in early 1946 represented the Flight Radio Officers Group, is it not?

A. Yes.

Q. At that time in early 1946 none of the plain-

(Testimony of Wyatt Franklin Fisher.)

tiffs in this action were Flight Radio Officers, that is correct, is it not? A. Yes, that is correct.

Q. And so far as any records that the Company has or may have were concerned, these four plaintiffs never authorized the Flight Radio Officers Association to represent them or bargain with them at or around December, 1945, or January or early part of 1946, that is correct, is it not?

A. Yes.

Mr. Athearn: We will stipulate that they did not. There was no such authorization by any of the plaintiffs to the Flight Radio Officers Association. That is not our theory at all.

Mr. Leonard: All right, fine. That is true, as a matter of fact, is it not, Mr. Athearn, of the entire period during which these men were in Navigation, or at any time?

Mr. Athearn: So far as I know, none of them ever authorized the Flight Radio Officers Association to do anything for them.

Mr. Leonard: All right, may I have a stipulation to that effect?

Mr. Athearn: That is correct.

Mr. Leonard: Thank you.

Q. And just so the record is clear, as result of the submission of Defendant's Exhibit—withdraw that. Subsequent to the submission of Defendant's Exhibit V to this System Seniority Board, which was composed of representatives of the Company and the Flight Radio Officers, why, this Seniority List, [192] Defendant's Exhibit M, for identifica-

(Testimony of Wyatt Franklin Fisher.)

tion, was promulgated by the System Seniority Board? A. Yes.

Q. And so we understand it, that was a System Seniority Board which had to do with problems of Flight Radio Officers and not problems of Navigators? A. That is correct.

Q. Now, with respect to the personnel whose names appear beginning on page 17 of Defendant's Exhibit M, for identification, under Group B, can you tell us, examining each name, name by name, what duties the men whose names appear there had in 1946 at the time the list was promulgated?

A. In Group B?

Q. Yes, in Group B.

A. I couldn't offhand without referring to personnel records.

Q. Can you tell us offhand whether or not any of the persons in Group B were in Navigation the way the four plaintiffs herein were of that date?

A. Again, I can't tell without referring to the personnel records. [193]

* * *

JOHN D. POINDEXTER

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your full name to the Court, please?

A. My name is John D. Poindexter.

The Court: Where do you live?

A. 201 Victory Road, Burlingame.

The Court: Your business or occupation?

(Testimony of John D. Poindexter.)

A. Radio operator.

The Court: Employed by whom?

A. Pan American Airways.

The Court: How long have you been so employed?

A. Twenty years and three months, approximately.

The Court: All right.

Direct Examination

By Mr. Athearn:

Q. At present you are the Chief Flight Radio Officer for the defendant Company?

A. That is correct.

Q. Getting right up to the question that counsel for the plaintiff asked, referring to page 17 of the Seniority List, which is Defendant's Exhibit M for identification, and the portion marked Group B, can you tell me whether on November 19, 1946, any one of those men on Group B was a man whose then occupation with the defendant Company was that of Navigator, and I am referring to the entire Group B? A. I am sure there were not.

Q. There were none? A. No.

Mr. Athearn: That is the information you wanted, counsel?

Mr. Leonard: Thank you.

Q. (By Mr. Athearn): This list, Defendant's Exhibit M for identification, referring to the first page of it and the words "Active FRO System Seniority List Official Posted December 4, 1946,"

(Testimony of John D. Poindexter.)

whose handwriting is that? A. That is mine.

Q. Can you tell me what you did with this list at or about the time you wrote that on there?

A. I posted it on the Flight Radio Officers Bulletin Board, which was installed by the Flight Radio Officers themselves for any information that pertained to their organization or their personnel.

Q. And about what date was that, do you know?

A. I received that document a few days before it was posted, before the official posting date, and I waited for that date to be given to me since the System wished to post all of them in all the Divisions at the same time.

Q. By the posting date you mean December 4, 1946? A. That is correct.

Q. This was the actual list that you received?

A. That is right.

Q. And did you say you posted it on the FRO Association bulletin board?

A. That is correct.

Q. That was located in the FRO room at the base of the defendant company at South San Francisco? A. That is correct.

Q. And your desk is in that room, is it?

A. Right.

Q. At that time you were Assistant Chief Radio Officer, or were you Chief?

A. I was Chief.

Q. How long did you leave the list posted on that bulletin board?

A. To the best of my recollection it was about a week or two after the 60-day period had expired.

(Testimony of John D. Poindexter.)

Q. By the 60-day period you are referring to a provision in the Agreement of April 17, 1946, which states that, "An employee shall be privileged to protest his position on the Seniority List provided that such protest is in writing outlining the reasons therefor and is made to the Seniority Board within 60 days after the Seniority List is posted," is that the 60-day period you refer to?

A. That is the one I refer to.

Q. During the period this list, Exhibit M, was posted, did any employees of the Company discuss with you their rank in the list or ask you to submit a protest to the Seniority Board?

A. Yes, there were some that contested their position on the Seniority List.

Q. Did you see employees of the defendant Company examining the list during that 60-day period?

A. I can't say that I did.

Q. Did you see any employees of the defendant? I don't mean the plaintiffs here, but——

A. Or any of the Flight Radio Officers that I had there working? That is right, many of them. In fact, all of them.

Mr. Leonard: It is leading and suggestive, Your Honor.

Mr. Athearn: Well, counsel knows——

Mr. Leonard: He said at first he couldn't say he saw any of them.

Mr. Athearn: Let's go over it again. [197]

Q. Did you see anyone look at the list during

(Testimony of John D. Poindexter.)

that 60-day period?

A. Yes, I saw practically everyone that I had working for me look at it during that time.

Q. Did you see any people look at it who were not Flight Radio Officers at the time?

A. Yes, there were people that looked at it.

Q. This particular room is one to which employees or Flight crews had access whether they were FRO's or not?

A. Yes, anyone in the Company had access to this office.

Q. Do you know whether any of the plaintiffs looked at this particular list during the 60-day period?

A. I can't say that I remember any one of the plaintiffs studying the list over. However, it is my opinion that——

Q. Well, hold it. Do you know for a fact that—would you say for a certainty that none of the plaintiffs looked at it?

A. No, I would not.

Mr. Leonard: I suggest it has been asked and answered. He said he couldn't say.

Mr. Athearn: I just wanted to make sure whether he is saying they didn't look at it or he doesn't know.

The Court: Objection overruled. Give the answer.

Q. (By Mr. Athearn): Go ahead and answer the question. Are you certain none of the plaintiffs looked at it?

A. I am not certain.

Q. You don't know, then?

A. No.

Q. As I understand, this FRO System Seniority

(Testimony of John D. Poindexter.)

List is revised from time to time, is that correct?

A. Yes, sir, that is correct.

Q. And one of them is a revision of April 11, 1947, which is referred to in the agreement of February 6, 1948?

A. Yes, sir.

Q. During the period of 1944, 1945, 1946, 1947, who was in charge of employment of Flight Radio Officers?

A. I did some of it. Mr. Axe, I believe did some of it.

Q. Who did some of the work?

A. Mr. Gentry.

Q. It was handled through your Department, though?

A. That is right.

Q. Can you tell us whether during any of those years your Department employed any Flight Radio Officers who do not appear on this list, Exhibit M?

A. What is the date of that list?

Q. This is the original list of November 19, 1946.

A. There are some others that were employed after that.

Q. Men who had no seniority on this list?

A. Correct.

Q. And under what circumstances were they employed?

A. I don't get what you mean.

Q. Well, as I understand, you employed men who had no seniority in the original list?

A. That is right.

Q. In other words, you hired men who had no seniority because you had exhausted that seniority list, is that correct?

A. That is correct.

(Testimony of John D. Poindexter.)

Q. Can you give us any idea of the number of men who were hired during those years who had no prior seniority rights?

A. I remember in 1947 there were, to the best of my knowledge, about 15 or 20 men that we employed here in this Division.

Q. New men? A. Yes.

Q. Are you familiar with the experience and qualifications of the four plaintiffs as Flight Radio Officers? A. Yes, I am familiar with it.

Q. Had any of them applied during 1947, would you have given them a job as a Flight Radio Officer? A. Yes, I would have.

The Court: You know them all, do you?

A. Yes, sir.

The Court: Been friendly with them?

A. Yes, sir.

The Court: They are friendly with you?

A. Yes, sir.

The Court: All right.

Q. (By Mr. Athearn): Now, I want to direct your attention to page 3 of Exhibit M where the name T. M. Hrutky appears as Number 68, and the date March 29, 1940, appearing after his name. Can you tell me whether or not March 29, 1940, was the first date that that gentleman went to work for the defendant Company?

Mr. Leonard: That is objected to on the ground incompetent, irrelevant and immaterial. T. M. Hrutky isn't a plaintiff.

(Testimony of John D. Poindexter.)

The Court: If he knows, he may answer. Objection overruled.

A. I know why the 1940 date was given, but the man was employed in 1936.

Q. (By Mr. Athearn): Have you any idea or any knowledge why the Board would give a 1940 hiring date to a man hired in 1936? A. Yes.

Mr. Leonard: That is objected to, asking for an opinion and conclusion and obviously based on hearsay, no foundation laid. This man was employed by them. They have the document which was prepared by four people.

The Court: Lay the foundation, if you can.

Q. (By Mr. Athearn): Are you familiar with the administration of this particular Seniority List? A. Yes, I am familiar with it.

Q. Over a period of time have you seen various cases handled under it and placement of seniority?

A. Correct.

Q. Do you know whether there was any practice of the Seniority Board of assigning employment dates to people other than according to their first date of employment? A. There were.

Q. What sort of practice was that?

Mr. Leonard: I submit, if Your Honor please, the foundation still hasn't been laid. It calls for hearsay. There apparently were four members of the Board, and this witness is telling us what he understands their practice was. I submit the best evidence would be testimony from the gentlemen who actually prepared that document.

(Testimony of John D. Poindexter.)

The Court: Who are they?

Mr. Leonard: I don't know, Your Honor.

The Court: Are they available?

Mr. Athearn: Not so far as we know.

Q. Do you know who they are? Are any of the men that worked on the list here, any of the Company representatives?

A. I believe there is one in this Division.

Mr. Athearn: Your Honor, we submit he can testify what this Board did even though he didn't sit in its deliberations.

The Court: If he knows.

A. Yes, I received the instructions from the Board to explain to these various ones that applied for adjustment of seniority why they did not get the seniority they thought they were entitled to.

Q. Can you give us any information how the case regarding Hrutky was dealt with? [202]

A. I sent that in to the Board.

Q. And saw the ruling of the Board?

A. That is right. It was never contested.

Q. This date 1940 was assigned by the Board on what basis?

Mr. Leonard: I object to the question.

* * *

The Court: I will allow the testimony to go in subject to motion to strike and over the objection of counsel.

Q. (By Mr. Athearn): Will you tell us how the date March 29, 1940, was selected or given as the employment date of T. M. Hrutky?

A. Yes, sir. When he left the group of Flight

(Testimony of John D. Poindexter.)

Radio Officers and became a Flight Navigator, his seniority in that group of Flight Radio Officers was terminated as accrued amount of seniority in that group. As an example, if he had five years of seniority in the Flight Radio Officers Group and was transferred as Flight Navigator and worked five more years in the Navigator's Group, when he came back to the Flight Radio Officers Group he would have the original five years of accrued seniority. That was the case with Mr. Hrutky. He had something like five years' seniority in the Flight Radio Officers' group. When he came back in 1943—or 1946, March, 1946, his seniority date was adjusted from five years from the date that he was—five years from the date that he was reinstated, which jumped his seniority from 1936 to 1940.

Q. In other words, the 1940 date was arbitrarily selected in order to express the seniority which he had retained during his absence from the Group?

A. That is correct. He then started accruing again.

Q. But he retained but did not accrue seniority while he was out of the Group?

A. I didn't get that. [204]

Q. But he retained seniority he had when he left the group?

A. That is correct, he retained it but did not accrue while he was functioning in the other category.

Q. Directing your attention to page 10 of Exhibit

(Testimony of John D. Poindexter.)

M under the Number 241, I direct your attention to the penciled notation "Rolly," and the date 9/5/42 written in under "Seniority Date." Can you tell us who Mr. Rolly is and what that means?

A. Mr. Rolly was a Flight Radio Officer who had been previously terminated during a reduction of force at the conclusion of our naval contract.

Q. Is he the same Mr. Rolly who appears under Group B? A. Yes, W. J. Rolly.

Q. He appears on page 17 of this exhibit, "W. J. Rolly, four years, three months, eight days," is that correct? A. That is correct.

Q. That is the seniority which he was retaining as of the date this list was promulgated?

A. That is correct.

Q. And I understand he later came back to work in the FRO group? A. That is correct.

Q. And the date represents what?

A. His adjusted seniority date, the same as Mr. Hrutky's was.

Q. In other words, he didn't go to work for the Company in 1942? A. Oh, no.

Q. He had worked long before that?

A. That is right.

Q. But this represents where he would have been if he had had a continuous service rather than broken service as a Flight Radio Officer?

A. 9/5/42 is the date of his seniority and the date he was employed, and you add four years, three months and eight days back, and that is where his seniority date starts.

(Testimony of John D. Poindexter.)

Q. You take the date he returned to the Group and roll back four years, eight days, and so forth?

A. Whatever he has retained.

Q. On November 15, 1948, can you tell us what the numerical position on the seniority list of the Flight Radio Officer would be least seniority but who was still employed on that date?

A. My recollection, the Junior Flight Radio Officer in the entire system had more seniority than any of the plaintiffs had accrued.

Mr. Leonard: I move to strike that as not responsive, an opinion and conclusion of the witness, if the Court please.

The Court: Read the question and answer.

(Question and answer read by the reporter.)

The Court: Let the question and answer stand. You can clarify it on cross examination if there is any question about it. [206]

* * *

Q. (By Mr. Athearn): Since November 15, 1948, have you been employing any Flight Radio Officers? A. No.

Q. What has been the employment situation for Flight Radio Officers since that date?

A. Constant reduction.

Q. Can you tell us how many Flight Radio Officers are employed now, either throughout the system or in the division?

A. At the present time we are cutting back some

(Testimony of John D. Poindexter.)

and have already given them notice of termination, and when those who have had their termination notice go at the end of thirty days we will have 26 Flight Radio Officers in the Pacific-Alaska Division.

Mr. Leonard: If Your Honor please, I move to strike the answer, which is predicated on what will happen thirty days from now. It isn't responsive to the question of how many they have today. Can you give an answer to that?

Mr. Athearn: I submit it is responsive. I asked what happened since November.

The Court: What was it?

A. We would have 26 less in this Division.

The Court: How many did you have? [209]

A. Thirty-eight. We laid off 12.

The Court: When did you lay off 12?

A. They have had their notice now that they will be laid off when the 30 days notice has expired.

The Court: Why is that?

A. Due to the advent of radiotelephone communication, and we no longer require the services of them.

Q. (By Mr. Athearn): Can you tell us how many Flight Radio Officers were employed in November, 1948?

A. Not without looking at that seniority list.

Q. This one?

A. That is right. Four hundred sixteen.

Q. They were employed in November, November 17, 1946?

A. That is right?

Q. Then by November 15, 1948, at the time the

(Testimony of John D. Poindexter.)

Navigators decision was made, can you tell us how many FRO's you had employed?

The Court: Approximately, if you know.

A. I can't tell from this list too well.

Q. (By Mr. Athearn): Well, we will have another witness who will have this exact information. In response to His Honor's question about the reduction of the number of Flight Radio Officers, I believe you mentioned something about the advent of radiotelephone? A. That is correct. [210]

Q. Maybe you better explain that a bit. Are you familiar with the type of aircraft that has been used in the Trans-Pacific operation of the defendant since 1940 to date? A. Yes, I am.

Q. What different kinds of planes have been used? You may refer to this diagram marked "Flight Deck Functional Diagrams."

A. The Martin M-130, the Old China Clipper, and the Boeing 314.

Q. Can you tell us the date—the Martin M-130 is the old China Clipper? A. Yes.

Q. This is a drawing showing the flight deck where the crew sit, is that correct? A. Yes.

Mr. Leonard: I make the general objection as to materiality of all this. It is a question of breach of contract. I am perfectly willing, on Mr. Athearn's representation that these are facts, to have a stipulation to the type of airplane in defendant's company. I don't think we need to encumber the record with testimony.

Mr. Athearn: I think it would be better, counsel.

(Testimony of John D. Poindexter.)

Mr. Leonard: All right.

Q. (By Mr. Athearn): The Martin M-130 is the old China Clipper, is that right? A. Yes.

Q. This diagram is the way the flight deck is located?

The Court: When did that China Clipper first go out? A. November, 1935.

The Court: It went from Alameda?

A. Alameda to Honolulu.

The Court: Were you there? A. Yes, sir.

Mr. Athearn: This shows the flight deck of the China Clipper. The lefthand corner of this diagram shows, this is where the pilot and co-pilot stay?

A. Yes.

Q. And they were physically flying the plane?

A. Yes.

Q. Directly behind them was the radio officer?

A. Right.

Q. And behind him the navigator?

A. That was down below deck.

Q. There was another deck below?

A. Yes.

Q. The engineer——

A. Back in the caboose.

Q. And the next diagram shows the Boeing 314, is that right? A. That is correct.

Q. That was used from 1940 to 1946?

A. Yes.

Q. In the Transpacific operations?

A. Right.

(Testimony of John D. Poindexter.)

Q. And how do people generally refer to that ship? A. Just the Boeing Flying Boats.

Q. Both the Martin M-130 and the Boeing 314 were flying boats? They landed on the water?

A. That is right.

Q. Incidentally, are all these diagrams to scale, approximately? A. They appear to be to me.

Q. In other words, the Martin 130 would be very large and had large crews? A. Correct.

Q. And the Boeing 314 had a pilot, co-pilot, navigator, radio officer, engineer, assistant engineer and extra crew. Is that another function?

A. Another radio operator.

Q. I see. A relief radio operator.

A. Right.

Q. Can you tell us the next type of ship that was used on the run?

A. During the war we have had some naval aircraft, the Martin PBM Flying Boats, and the Consolidated PB2Y3.

Q. Both those ships, the Martin PBM and the Consolidated PB2Y3 are shown in the second and third diagrams with pilots, radio officer, navigator, and engineer, is that correct? [213]

A. That is correct.

Q. Can you tell us the next type of plane that was used on the run?

A. That was a Douglas DC-4.

Q. And that is shown here as 1945 to 1950?

A. That is right. We still have them.

Q. Some of those are still being used? Those

(Testimony of John D. Poindexter.)

have also the same functions as mentioned on the two previous, is that correct.

A. What do you mean?

Q. Pilot, co-pilot, radio officer, engineer and navigator? A. That is right.

Q. The Lockheed Constellation was used during what period on the trans-Pacific run?

A. 1946 to 1947.

Q. This diagram shows the members and function of the crew in the nose of that ship?

A. That is right.

Q. This is the nose of the ship, is it not? (indicating) A. Yes.

Q. What is the new type of plane now being used? A. That is the Boeing Stratocruiser.

Q. The B-377? A. Yes.

Q. That is a double-deck type of plane?

A. That is right.

Q. Does this diagram clearly show the functions on the flight deck of the Boeing 377?

A. That is correct.

Q. This shows the functions on that flight deck as it is used on the trans-Pacific run from San Francisco and Los Angeles to Honolulu and Manila—to Manila and Tokyo? A. Correct.

Q. That was pilot, co-pilot, engineer and pilot navigator? A. That is right.

Q. The pilot navigator is the man who can fly the ship as well as navigate?

A. He relieves the pilots, yes.

Q. Where is the radio officer then, on that ship?

(Testimony of John D. Poindexter.)

A. There is no radio officer on there. Those planes carry on their communications by radio-telephone.

Q. You might briefly explain the difference between radio-telephone and radio-telegraph.

A. Radio-telegraph equipment must carry a licensed radio operator capable of transmitting and receiving messages in code.

Q. That is the old dot-and-dashes, is it?

A. Yes.

Q. Like a telegraph key? A. Exactly.

Q. Radio-telephone is worked by voice?

A. That is correct. The pilot picks up the microphone and [215] talks to the station.

Q. On the Boeing Stratocruiser if the pilot had occasion to transmit a message to the home base, how does he do it?

A. Just picks up the microphone and meshes the button and calls the base.

Q. Direct? A. Direct, yes.

Q. If he was in Manila would that be true?

A. He will call the guard station which is guarding him, which will be either Manila or Guam, whichever he was closest to.

Q. And they connect him direct? A. Yes.

The Court: And they can talk to him directly by voice?

A. By voice.

The Court: I can almost understand this situation, gentlemen, in relation to your jobs. I can see

(Testimony of John D. Poindexter.)

them fading away with this modern method. All right.

Q. (By Mr. Athearn): How long have you been in the radio communications field, Mr. Poindexter?

A. Since 1920.

Q. Are you familiar with the type of radio communication used both by the defendant and other airlines?

A. Generally speaking, yes, sir. [216]

* * *

Q. Shore to shore radio stations use what type of radio transmission now?

A. They are gradually developing this radio-teletype which they are using now to move most of our traffic out across the Pacific, point to point.

Q. Generally what does radio-teletype do? How does it differ from voice radio?

A. Anyone that can operate a typewriter can operate that.

Q. In other words, a typewriter at the transmitting point runs a tape which is sent through the air?

A. That is right. As he types on the typewriter, it cuts a tape which is fed into a transmitter which transmits it, and the operator on the other end picks this up, feeds it into another typewriter which types exactly what this one is tying.

Q. Do any airplanes carry a radio-teletype?

A. President Truman's is the only one I know of.

Q. President Truman's plane has a radio-teletype of this kind you have mentioned?

(Testimony of John D. Poindexter.)

A. That is right, so I have been told. [217]

Q. On the basis of your experience in the radio field, have you formed any opinion of the probable future employment of radio officers on international flights, in, let us say, the next ten or twenty years?

Mr. Leonard: That is objected to on the ground it is speculative, conjectural, and no foundation laid.

* * *

The Court: It goes to the weight of the testimony.

* * *

A. I don't think there will be any Flight Radio Officers.

Q. (By Mr. Athearn): You mean that there will be no individual persons doing nothing but sending radio messages?

A. That is right.

Q. That will be combined with pilot and other functions, is [218] that right?

A. Radio-telephone.

Mr. Athearn: That is all we have from this witness.

Cross-Examination

By Mr. Leonard:

Q. What factors did you take into consideration, Mr. Poindexter, in forming your opinion, the one you just expressed?

A. Past history, I suppose.

Q. Anything else?

A. My own observations of the efficiency of operation of the modern type of equipment.

(Testimony of John D. Poindexter.)

The Court: I don't know who prepared this map, but that would almost give you the answer.

Mr. Leonard: Possibly so, Your Honor. I would like to proceed and ask the witness this.

The Court: I will not interfere with your procedure at all. Proceed.

Q. (By Mr. Leonard): Mr. Poindexter, you stated that radio-telephone involved direct communication between the airplane and a base, in your case either a base here in San Francisco or one in Manila, is that correct?

A. Well, the direct radio-telephone communication as between the stations having the responsibility of the guard, that is, usually consists of three stations: the one of departure, the one of arrival, and an alternate in case he loses communication with [219] one of them.

Q. Well, take your last plane there in the panel, this Boeing Stratocruiser which has radio-telephone. First let me ask you, does it have any other radio equipment besides radio-telephone on it?

A. Radio-telephone equipment is adaptable for telegraph or radio-telephone.

Q. So that the equipment which it has is adaptable to be used as radio-telegraph?

A. Just by throwing a switch.

Q. And the persons who would use it as radio-telegraph are persons trained as Flight Radio Officers, is that correct?

A. That is correct.

Q. So by throwing a switch, to get back to what we were talking about earlier, you would have the

(Testimony of John D. Poindexter.)

equipment to give these men their jobs so that when you throw the switch so it is on the radio-telephone phase of operation—I am probably not using correct technical terms, but I think you understand what I mean—a pilot who is not necessarily trained as a Flight Radio Officer can operate the radio-telephone equipment by simply talking into a microphone?

A. That is correct.

Q. And if I understand it correctly, he can by talking into the microphone put himself in communication with, generally speaking, three stations: the point of departure, the point of [220] arrival, and some alternate point? A. Correct.

Q. And only with those three stations, isn't that right? A. Not necessarily.

Q. With radio-telephone equipment as it is now in the Boeing Stratocruiser, has radio-telephone, not telegraph, with what other point can he put himself in communication?

A. Any station that happens to be guarding that particular frequency.

Q. Well, as a practical matter, when blind flying across the Pacific Ocean, what stations are guarding the frequency of the Boeing Stratocruiser?

A. CAA radio stations and Air, Inc., radio stations.

Q. In addition to the point of departure, departure and arrival, there are CAA radio stations, is that what you say? A. That is right.

Q. Where are they located?

(Testimony of John D. Poindexter.)

A. They are located in San Francisco, Honolulu, Wake, Guam, Canton.

Q. And what was the other group you mentioned?

A. Air, Inc. Aeronautical Radio Incorporated.

Q. Where is that located?

A. San Francisco, Honolulu, Los Angeles, Seattle, Tokyo, Manila. I think that is all.

Q. So that a pilot can put himself into communication with [221] certain air stations when he is flying across the Pacific, with certain air stations up and down the Pacific Coast and certain named islands in the Pacific Ocean and Tokyo?

A. Yes.

Q. Can he put himself in communication with any ships by radio-telephone? A. No.

Q. In order to communicate with ships you have to use radio-telegraph, is that right?

A. Radio-telegraph.

Q. When a radio-telegraph message is sent out it does not go to this limited number of stations we discussed with radio-telephone, but the radio message simply goes over the ether waves and anybody who happens to pick it up can pick it up, is that right?

A. If it is on 500 kilocycles, it is an international distress frequency guarded by all ships and stations.

Q. About this radio communication, as a result of safety at sea and development there has grown up one particular frequency which you mentioned——

A. 500 kilocycles.

(Testimony of John D. Poindexter.)

Q. —which is known throughout the world as an international distress frequency, is that correct? [222]

* * *

Q. Mr. Poindexter, in forming your opinion that within the next ten to twenty years there wouldn't be any FRO's or any radio-telegraphy in aviation, did you take into account the [225] fact that there is an international distress signal of 500 kilocycles which is a radio-telegraph wave length?

A. Yes.

Q. And did you consider the fact that as of the present time—not in the future, as His Honor suggests, but at the present time 500 kilocycles, which is a radio-telegraph frequency, is the one recognized internationally by vessels throughout the world as the SOS or safety frequency?

A. That is right.

Q. And it is your opinion, then, that the airlines in the next ten to twenty years will forego the use over long water flights from here to areas in the Pacific, will forego the opportunity to use the 500 kilocycle frequency, is that correct?

A. I don't think it would forego the use of it, but it will forego the use of carrying Flight Radio Officers.

Q. In other words, you will have some radio equipment to operate on that 500 kilowatt frequency, but you won't use Flight Radio Officers, is that what you are saying? A. That is correct.

Q. In other words, the kind of person who will

(Testimony of John D. Poindexter.)

operate the radio equipment might be changed, won't be Flight Radio Officers but another person will operate the radio equipment?

A. It will just be for emergencies.

Q. It will be for emergency? But it will be necessary and there will be radio equipment to be operated at least in this [226] emergency situation, the SOS and safety at sea situation?

A. That is right.

Q. Did you also take into consideration, Mr. Poindexter, when you formed your opinion that there would be no Flight Radio Officers in ten to twenty years, that on March 20, 1950, the Civil Aeronautics Board issued a report which required communications equipment and facilities for long over-water flights?

A. That is right.

Q. Are you familiar with that report?

A. Yes, sir.

Q. The Civil Aeronautics Board is a Federal agency, is that correct?

A. That is correct.

Q. Just generally, without detail, what jurisdiction does it have over operations of the defendant in this proceeding, of Pan-American?

A. They formulate the laws regarding safe operation of aircraft.

Q. And they promulgate regulations which, under the law, the Pan-American Airways has to follow?

A. That is correct.

The Court: At the inception, in 1935, they had water planes. What about when you got down in

(Testimony of John D. Poindexter.)

the water? As a practical matter, what occurs in this later plane?

A. They have a spare transmitter which they put into the life [227] rafts capable of transmitting a distress signal on this distress frequency.

The Court: Of course it has nothing to do with the merits of the case, but this modern age, I try to keep up as best I can with what is going on.

Q. (By Mr. Leonard): I show you, Mr. Poindexter, a mimeographed document bearing the caption "Civil Aeronautics Board, Washington, D. C." That is the report we both referred to concerning the use of 500 kilocycles frequency by the CAB, issued within the last month or so?

A. That is correct.

Mr. Leonard: We offer it in evidence.

Mr. Athearn: No objection, I don't think it is relevant. This turns it into a judicial review of a decision by the CAB.

The Court: Let the record indicate the purpose of this offer.

Mr. Leonard: Yes, if your Honor please; it is limited solely and exclusively to meet the testimony brought out on direct examination of this witness, particularly so much of it as relates to the opinion with respect to the future of Flight Radio Officers and the use of Radio-telegraphy aboard aircraft over long water routes. (Whereupon, the mimeographed document bearing caption "Civil Aeronautics Board, Washington, D. C.," was admitted into evidence as plaintiffs' Exhibit 12.) [228]

(Testimony of John D. Poindexter.)

* * *

Q. (By Mr. Leonard): Mr. Poindexter, with respect to Defendant's Exhibit M, for identification, you say that that was posted on an FRO bulletin board in the room in which you had your desk for some two weeks in excess of the sixty days after November, 1946, is that it?

A. That is correct.

Q. In what building was that room located?

A. Between 1945 and 1948 I moved so many times, I can't remember exactly where it was. I moved about five or six times.

Q. All right, do you know whether or not, Mr. Poindexter, a similar list was ever posted for Navigators at any place?

A. Flight Radio Officers' list?

Q. No, for Navigators? Do you know whether they had this kind of list that was ever posted anywhere?

A. I am not sure, but to the best of my recollection it was posted also. The Pilots I know was, and I believe the Navigators was posted also.

Q. You know the Pilots' list was and you think the Navigators was? Did you ever have occasion to see those lists, Pilots and Navigators lists? [229]

A. The Pilots' List, I did. I don't remember definitely having seen the Navigators' List.

Q. You stated that during 1944 to 1947 you along with Mr. Axe and Mr. Gentry were in charge of the employment of Flight Radio Officers, and you

(Testimony of John D. Poindexter.)

said in 1947 you did employ some 15 or 20 new men, is that right?

A. To the best of my recollection, yes.

Q. I think you also said you would have given the plaintiffs employment as Flight Radio Officers if they had applied for such employment?

A. I would have considered them, yes.

Q. You would have considered them? Did you ever get in touch with them and offer them such employment, or communicate with them in any way?

A. I don't believe I can say that I did, nor that I didn't. I don't remember.

Q. Can't say one way or the other? A. No.

Q. You knew that they were then functioning as Navigators for the Company, did you.

A. That is right.

Q. You knew that they had been Flight Radio Officers and that they transferred to Navigation in 1941? A. That is right.

Q. As a matter of fact, the three plaintiffs who are in the [230] courtroom today, that is, all those except Mr. Charman, were the last three men to actually fly as Navigators for the Company, isn't that right? A. I believe so.

Q. And they were being used as Check Navigators and as Instruction Pilots in Navigation, isn't that right? A. That is right.

Q. And you knew that at the time, did you not, all through 1947 when they were doing this work?

A. In 1947 I am not sure I knew that.

Q. 1948? A. Possibly 1948, yes.

(Testimony of John D. Poindexter.)

Q. You knew they were functioning for the Company, that is, training pilots and training other navigators, isn't that right? A. Yes.

Q. Isn't that the reason why, although you might have had some openings in Communications, you didn't call on them to transfer because the Company needed their services in Navigation during 1947 and 1948? A. That is possible, yes.

Q. Then of course beginning with November 15, 1948, when navigation posts were abolished, the Company no longer needed those services in Navigation, that is correct, isn't it? After the Arbitrator's Award?

A. That is when they were terminated, yes. [231]

Q. Did you get in touch with them after that and tell them you could use them as Flight Radio Officers? A. No.

Q. Directing your attention again to Defendant's Exhibit M, page 10 thereof, Mr. Athearn pointed out that the name Rolly there, dated 9/5/42, was inserted in pencil; and let me ask you first, was this pencil insertion on the list when it was posted in 1946? Was that pencilled notation on the list when it was posted? A. I don't believe it was.

Q. It was put on there at some subsequent time?

A. That is right.

Q. Did you put it on?

A. When Mr. Rolly returned to the job.

Q. Did you put Mr. Rolly's name there? Is that your writing? A. That is my writing.

(Testimony of John D. Poindexter.)

Q. When did you put this on?

A. At the time he was reemployed. I would have to check the records to see.

Q. In other words, you put it on——

A. It wasn't 9/6/42, obviously, when the list itself wasn't promulgated until 1946.

Q. Of course, but it was sometime between the time the List was promulgated and the present day that you made that insert?

A. That is right. [232]

Q. At the time you made that insert, however, you didn't bother to scratch Rolly's name off Group B on page 17, did you? A. No.

Q. On November 15, 1948, do you know who the Junior FRO—Flight Radio Officer—was?

A. Yes.

Mr. Athearn: Counsel, may I let the witness refresh his recollection from the document?

Mr. Leonard: If he needs it. He said he knows.

A. A man in the Atlantic Division named Everett, I believe.

Q. Do you know what his date of employment was with the Company?

A. Yes, Flight Radio Officer.

Q. His date of employment?

A. Oh, his date of employment? Not without referring to the List.

Q. Counsel has given me the Seniority Roster wherein is marked Mr. Everett's name. Would that be correct, his date of employment, 4/19/43?

(Testimony of John D. Poindexter.)

A. That is right, his seniority date.

Q. Seniority date? All right. So that as of the date that the plaintiffs in this case were terminated the Junior Flight Radio Officer was one whose seniority date was April 19, 1943?

A. That is correct.

Q. And according to the numbering at the side, there were 274 such Flight Radio Officers in the office, is that right? [233]

A. Yes, that is right.

Q. Everybody given a seniority date senior to April 19, 1943, was in fact employed as a Flight Radio Officer on November 15, 1948, when these men were discharged?

A. That is right.

Q. Do you happen to know whether Mr. Everett's seniority date corresponds with his date of first employment with the Company?

A. No, I am not familiar with it.

Q. Of the 274 men up to and including Mr. Everett, do you happen to know how many instances there are where the seniority date as it appears on the list does not correspond with the date of first employment?

A. I couldn't say definitely how many. I know there are some.

Q. There are some? Mr. Hrutky, Ted Hrutky, is one example?

A. Mr. Ted Hrutky. Mr. Hendrickson is one, and Mr. Davis is another, and Mr. Rolly is another one.

(Testimony of John D. Poindexter.)

Q. That is four. Would you say there were a dozen of them?

A. Those are just in this division.

Q. I am talking about this division.

A. Those are about the only ones I recall at the present time.

Q. In other words, it is fair to say that substantially the dates of seniority on the Seniority List correspond with dates of first employment of the men by the Company, isn't that correct?

A. No.

Q. That is not correct?

A. No, that is what I was just saying. There are about four that I remember there where they do not coincide.

Q. Out of 274? I see.

Mr. Athearn: He spoke of the Pacific Division and this is system-wide.

Mr. Leonard: We will get to that.

Q. How many of the 274 are in the Pacific Division, approximately?

A. I believe about 100, approximately, at the time.

Q. Of the 100, there are about four of them, you say, whose seniority date is different from the date of first employment? A. That is correct.

Q. So that in fact there are about 96 out of the 100 whose seniority date corresponds with their date of first employment?

The Court: Why that differential?

(Testimony of John D. Poindexter.)

A. That is due to their having gone into another job and quit accruing seniority, in this Group, then when they return there is a readjustment of seniority date.

Q. (By Mr. Leonard): As far as Mr. Hrutky, Ted—— A. Yes?

Q. ——in his case you said there was no protest with that procedure, or no contest by him?

A. Yes.

Q. That is also the case in the other three or four men, isn't that right?

A. That is right.

* * *

Q. Now, you said in November, 1946, there were approximately 415 FRO's—416. Do you remember that testimony? A. 416, yes.

Q. Were you talking about system-wide?

A. System-wide.

Q. Tell us about the Pacific Division. How many were there in the Pacific Division in November, 1946? A. November, 1946, approximately 114.

Q. And you didn't have figures for November, 1948? I think you said you didn't have those?

A. November, 1948, I believe there were around 98. I am not sure. I would have to refer to my List. That is approximately correct.

Q. Incidentally, do you know who the Junior Flight Radio Officer was in the Pacific Division on November 15, 1948?

Mr. Athearn: We object to that. It has already been testified this was a system-wide seniority list,

(Testimony of John D. Poindexter.)

so that it would be purely arbitrary who the man on the Pacific list was.

Mr. Leonard: All right, I accept that. [236]

The Court: This diagram hasn't been marked.

Mr. Athearn: No, I was going to move for its admission, Your Honor.

The Court: Let it be admitted and marked, next in order.

Mr. Athearn: We will offer the diagram marked "Flight Deck Functional Diagram" as Defendant's exhibit next in order.

(Whereupon diagram above referred to was marked Defendant's Exhibit W, and received in evidence.)

Q. (By Mr. Leonard): With respect to that diagram, Mr. Poindexter, do you know which of those various ships that are demonstrated there were actually flown by any of the plaintiffs when they were Flight Radio Officers or Navigators? Which ones did they fly?

A. They flew the Martin M130, and the Boeing 314. I don't believe that they were ever assigned as Flight Radio Officers on any of the others.

Q. You say you don't believe they were?

A. No, I don't believe so.

Q. Are you certain of that?

A. No, I am not certain. I don't remember the exact date we received the first PBM Martins which were given us by the Navy after we were under the Navy contract.

(Testimony of John D. Poindexter.)

Q. How many of those Douglas C-4's is the Company operating in this Pacific Division?

A. At the present time I think about eight. [237]

Q. And how about the Lockheed Constellations, how many of those in the Pacific Division?

A. None.

Q. How about the Stratocruisers?

A. Eleven.

Q. Eleven? A. I believe that is right.

Q. In 1941, what were your duties with the Company? What was your position?

A. 1941? Chief Flight Radio Officer.

Q. At that time, prior to their transfer to Navigation, these four plaintiffs worked under you, is that right? A. That is right.

Q. And you knew that they were transferred to Navigation? A. That is right.

Q. Did you know that they had received these documents which are in evidence, Plaintiff's Exhibits 1 and 2, these communications from the Company with respect to their retransfer back?

A. No, I never knew they had that. I never received a copy of that in my office.

Q. You never received a copy until this suit was instituted, and you never knew these men had received such communication from the Company, is that right?

A. That is correct. At that time most of the correspondence in connection with moving of personnel from one department to another was handled by the Communications Superintendent's Office and

(Testimony of John D. Poindexter.)

his secretary, so I didn't—my primary duty was training and assignment to their flights, checking their work.

Q. More of an actual operational function than labor relations or employment function?

A. That is right.

Q. Or personnel function.

A. That is right.

Mr. Leonard: I think that is all.

Redirect Examination

By Mr. Athearn:

Q. I am going to ask this witness to refer again to this list, the Seniority List, and ask you if you can tell me as of November 16, 1948, who the most junior man was on the FRO Seniority List who was employed? A. That is a Mr. Everett.

Q. That is the Mr. S. L. Everett whose number was 274? A. That is right.

Q. And whose employment date was April 19, 1943? A. Right.

Q. And as I understand it he had five years, seven months, eight days seniority, is that right?

A. Approximately.

Mr. Leonard: Well, just a minute, if Your Honor please——

Mr. Athearn: This is just arithmetic.

Mr. Leonard: Let me make my objection. There isn't anything on the document that says he had five years, seven months, or whatever it was, senior-

(Testimony of John D. Poindexter.)

ity. It says at the top of it "Seniority Date" and gives a date. Counsel says it is a matter of subtraction. Here we get into a matter into which Your Honor will interpret the document. I think the record should show counsel handed the witness a paper and apparently read from the paper something that says he had five years seniority. It doesn't say any such thing. It gives the employment date.

The Court: What is the fact, if you know?

Mr. Leonard: The fact is that it says "Seniority Date 4/19/43" and I will stipulate to that.

Mr. Athearn: I will ask this: Mr. Witness, can you in your head subtract from November 16, 1948, the year April 19, 1943, and tell me whether the difference is five years, seven months and eight days?

Mr. Leonard: Objected to, if the Court please.

Mr. Athearn: I am just asking him if he can do the subtraction.

Mr. Leonard: I object to that on the ground it is something the Court can do. The document is in evidence.

The Court: It is a matter of subtraction.

Mr. Leonard: Yes. I submit Your Honor can do that. We don't have to have the witness do it.

The Court: We will let the witness do it and then I won't have to do it. [240]

Mr. Leonard: Very well, Your Honor.

Q. (By Mr. Athearn): Do you know whether that subtraction is accurate?

(Testimony of John D. Poindexter.)

A. That subtraction is accurate because the gentlemen down there and myself did it.

Q. Did you do some arithmetic about the employment as a Flight Radio Officer of the plaintiff Charman?

Mr. Leonard: Objected to on the ground it is incompetent, irrelevant and immaterial. There is nothing in this record to indicate this man should have done any arithmetic about the employment as Flight Radio Officer of the plaintiff Charman, if Your Honor please. The Company's contracts, which are in evidence as Plaintiff's Exhibits 1 and 2, say Mr. Charman will be returned to his services as Flight Radio Officer without any loss of seniority. Well, he is apparently having the witness adopt some theory of his own and do his subtracting on that basis.

The Court: I am giving you both an opportunity to have your record on your theories.

Q. (By Mr. Athearn): Have you calculated how many years, months and days the plaintiff Charman was employed as a Flight Radio Officer?

A. Five years, two months, twenty-five days.

Q. And the next plaintiff in order?

A. Cummings, five years, one month, twenty days. [241]

Q. And the next plaintiff?

A. Hrutky, three years, six months, sixteen days.

Q. And the next one?

A. Schwella, four years, seven months, fifteen days.

(Testimony of John D. Poindexter.)

Q. Had each of those plaintiffs been placed on the seniority list as of the 16th of November, 1948, what would have been the simulated seniority date?

Mr. Leonard: Objected to, if Your Honor please, on the ground incompetent, irrelevant, and immaterial. There has been no testimony about any simulated seniority. The contract we are suing on here, which is in evidence, says, "You will be returned to your job commensurate with your length of service with the Company and seniority," not to any simulated seniority.

The Court: I will give him a record.

Q. (By Mr. Athearn): What would have been the dates for each plaintiff?

A. They couldn't be employed. The junior man in the system had more seniority than any of these.

Q. But what would their dates have been if they had been inserted on the list below the point of employment?

A. Five years, two months, twenty-five days back.

Q. No, what would have been the year back? Have you calculated what that is?

A. That would be, Charman would have been 9/22/43.

Q. Go ahead.

A. Cummings, 10 / 14 / 43. Hrutky, 4 / 30 / 45. Schwella, 4/1/44.

Q. All those would have been more junior than the last junior man employed on that date?

A. That is right.

(Testimony of John D. Poindexter.)

Mr. Athearn: No more questions.

Recross-Examination

By Mr. Leonard:

Q. Did you do all that earlier or while you were on the stand here did somebody at counsel table do it during recess?

The Court: He said he did it while sitting down there and he had assistance.

Mr. Athearn: Who helped you?

A. Mr. O'Keefe. We handled it together.

Q. (By Mr. Leonard): Mr. Poindexter, did you also do any arithmetic basing your computations on the original date of employment on Mr. Charman, Mr. Schwella, Mr. Hrutky, and Mr. Cummings? Did you make any such arithmetic? A. No.

Q. Showing you Defendant's Exhibit M, for identification, I think the record shows already Mr. Charman was first employed by the Company as a Flight Radio Officer or Assistant Radio Officer on October 7, 1935; and accepting that as seniority date on this roster, Mr. Schwella would appear between Number 9 and Number 10 on the list?

A. If you figure seniority that way, it would be correct. [243]

Q. That is right. With respect to the other plaintiffs in this case, if you figured the seniority that way each of them would be within the first twenty on the System Seniority List of November 19, 1946, isn't that right?

(Testimony of John D. Poindexter.)

A. They would be substantially higher in seniority.

Q. As a matter of fact, the junior man, Mr. Schwella, I think was employed some time in 1937, is that your understanding? A. I believe So.

Q. So that as you said they had substantially high seniority.

The Court: Call your next witness.

Q. (By Mr. Leonard): Now, you said that you couldn't have offered those men a job, or couldn't have employed them in 1946 because they would all be junior to this—what's his name?—Mr. Everett.

Mr. Athearn: What year? A. 1946? No.

Q. (By Mr. Leonard): When was it?

A. When they were laid off.

Mr. Athearn: In 1948? A. Yes.

Q. (By Mr. Leonard): Were they junior to Mr. Everett in 1946 and 1947?

A. Possibly not. Their seniority was accrued and stood still while Mr. Everett continued to accrue seniority.

Q. Did you check their seniority in 1947 and find out what seniority they had?

A. No, I have no reason to.

Q. What did you mean when you told His Honor on direct examination you would have given these men jobs if they had applied for them in 1947?

A. At that particular time I was short and needed Flight Radio Officers and hired new men because I could not get old experienced men.

(Testimony of John D. Poindexter.)

Q. You mean you had gone out through that seniority list in 1947?

A. Gone through it? Yes.

Q. But there was nobody on the seniority list out of work in 1947? A. That is right.

Q. That is right? All the Flight Radio Officers on the List were employed in 1947?

A. That is right. There was no one I could offer employment to, so we were required to hire new men.

Q. And at that time, as you have told us, you did not get in touch with these men and seek to employ them as Flight Radio Officers, that is correct, isn't it?

A. I don't remember having contacted them.

* * *

DELVIN EUGENE AXE

called as a witness on behalf of the defendant,
sworn.

The Court: Your full name?

A. Delvin Eugene Axe.

Direct Examination

By Mr. Athearn:

Q. Where do you live?

A. 344 Concord Drive, Palo Alto.

Q. Your business or occupation?

A. I am Division Communications Superintendent, Pan-American.

Q. How long have you been so employed?

(Testimony of Delvin Eugene Axe.)

A. Since 1947.

Q. Prior to that your title was what?

A. I had a number of titles prior to that.

Q. In 1946, what was your title?

A. I was Assistant Communications Superintendent, which job actually, the title at that time was Manager of Communications, which would make me Assistant Manager.

Q. At that time FRO's were under the Communications Department? A. That is right.

Q. In 1946 did you ever have any conversation with the plaintiff Cummings, about employment as a FRO? A. Yes, sir.

Q. Where did that occur?

A. In the Administration Building at Mills Field, South San Francisco.

Q. What portion of the Administration Building? A. Second floor.

Q. In what room?

A. As I recall, the conversation wasn't in a room. It was held in the hall.

Q. Who else was there, if you can remember?

A. I can't remember specifically now. I remember Mr. Cummings very specifically inasmuch as he acted somewhat as spokesman for the group, but there were two or three other ex-FRO non-pilot navigators with him.

Q. Let me see, there were two or three other persons who at one time had been Flight Radio Officers but who were then Non-Pilot Navigators in addition to Mr. Cummings, is that right?

(Testimony of Delvin Eugene Axe.)

A. That is right, yes, sir.

Q. And they met you in the hallway, did you say?

A. Yes.

Q. What was said?

A. To the best of my recollection Mr. Cummings acted somewhat I suppose I might say, as spokesman.

Mr. Leonard: I move to strike that as an opinion and conclusion of the witness.

The Court: That is a fact; is that a fact?

A. Yes, sir, it is a fact.

The Court: All right. [247]

Q. (By Mr. Athearn): Proceed.

A. Mr. Cummings acted as spokesman for the group. He showed me a letter from Mr. Angus, the one of 1941.

Q. You refer to the one that was like Plaintiff's Exhibit 1?

A. No, sir, I don't. It seems to me it was a much shorter letter.

* * *

Mr. Athearn: Very well. He had a letter signed by Mr. Angus to what effect?

A. To the effect that he had been transferred to duty as a Navigator; that in the event that job should prove of a temporary nature he would be reinstated as a Flight Radio Officer with the seniority and privileges, I believe it said—certainly it mentioned seniority that he held at that time.

Q. And what did he say further respecting that?

A. As I recall, the conversation opened with a

(Testimony of Delvin Eugene Axe.)

question as to whether or not we, meaning the Communications Department, presumably, intended to honor Mr. Angus' letter. [248]

Q. And what was said next?

A. I stated to him emphatically that I would honor to the very best of my ability any commitment made by George Angus.

Q. What was said next?

A. We then discussed the—I am only taking time to refresh my mind to get it all in focus—we discussed the status of the Non-Pilot Navigators, and discussed the desirability from their standpoint of returning to the Flight Radio Officers group.

Q. Did you make any definite recommendation?

A. Yes, I did.

Mr. Leonard: I object to what recommendation he made.

The Court: What was said?

A. I told them upon the basis of my knowledge as a rather minor executive of the company that I would recommend that they get back into the FRO group, the reason being that union contract obligations were becoming more stringent daily. I told them I would take that action on application; that it would be an extremely difficult problem, perhaps, but that I felt it could be liquidated and we would do our best to do so on application.

Q. (By Mr. Athearn): Was there anything else said in that conversation?

A. Nothing that would change the general subject I have discussed, no. [249]

(Testimony of Delvin Eugene Axe.)

Q. Did you thereafter receive any applications from any of the plaintiffs for an FRO job prior to November of 1948? A. I did not.

Q. Had any applied, would you have been able to place them? A. I believe we would have.

Q. Do you feel they were qualified for FRO jobs?

A. I can state unqualifiedly that, to my personal knowledge, that each of the defendants——

Q. Plaintiffs?

A. All right, the plaintiffs individually are some of the best qualified men in the industry.

Q. You would have been happy to get them back then, wouldn't you? A. Most certainly.

Q. Did you have any other conversations later with—along the same line?

A. Yes, I did have, but I don't recall what specific individuals.

Q. You don't remember whether you talked to any of the plaintiffs after that?

A. No, I couldn't say.

Q. At the present time do you have any FRO jobs that are available for employment in your division in your department? A. No, sir.

Q. You are laying them off, aren't you?

A. That is right. [250]

Q. What kind of jobs are there, either filled or unfilled, in your department now? A. None.

Q. Well, you have some men working in your department, don't you?

A. Yes, we have, but there are no vacancies.

(Testimony of Delvin Eugene Axe.)

Q. What general type of men do you have now working, what kind of employment?

A. Three general classifications: 1, the administrative; secondly, engineer; and thirdly, maintenance.

Q. About how many administrative?

A. About eight.

Q. Do you think any of the plaintiffs is qualified for any of those eight administrative jobs?

A. No, sir, at the present time and with the knowledge I have I do not think so.

Q. And the second group was what type of job?

A. Engineering.

Q. Will you describe what that is?

A. Those jobs require personnel who are qualified engineers, or men who have had a great many years of practical experience and intimate experience with design and installations and that sort of work. The chief engineer must be a graduate electrical engineer, at least, with a considerable number of years' experience. [251]

Q. Is any of the plaintiffs qualified for one of those jobs? A. Not to my knowledge.

Q. And the last group of jobs?

A. They are mechanics' jobs, mechanical nature, repair, maintenance, installation.

Q. Kind of shop jobs?

A. Shop jobs, yes, sir.

Q. What do they pay, approximately?

A. They start about at \$1.08 an hour and have

(Testimony of Delvin Eugene Axe.)

a top of \$425 a month for the so-called assistant foreman classification.

Q. Do you have any group radio operators jobs available?

A. None wherein we could utilize American personnel.

Q. They have to be citizens of other countries?

A. That is right.

Mr. Athearn: No more questions of this witness.

Cross-Examination

By Mr. Leonard:

Q. Mr. Axe, don't you employ any Flight Radio Officers today?

A. Well, I am sorry I misunderstood perhaps at that point. I thought Mr. Athearn spoke of ground personnel.

Q. You do employ flight radio personnel, don't you? A. Yes.

Q. When you said a minute ago that these plaintiffs were the best qualified men in the industry as far as you were concerned, why, you were speaking of their qualifications as [252] Flight Radio Officers, is that correct? A. That is right.

Q. How many Flight Radio Officers do you have at the present time?

A. I believe we have some 38 in the Division at the present time.

Q. Do you know what the date of—I will withdraw that and use the exhibit. When you say, Mr.

(Testimony of Delvin Eugene Axe.)

Axe, you have 38 men, Flight Radio Officers, would you examine Exhibit M?

A. I am not qualified to state which men are on there. I might state my reason for lack of qualification, if you wish.

Q. Let me ask my question. Perhaps you can answer it. Can you tell us which of the men on this list is the junior of the 38 men?

A. That I cannot.

Q. You can't tell?

Mr. Leonard: I wonder if we could have that information, which of the present Flight Radio Officers is junior man so that we can have it indicated on the list who he is.

(Colloquy between counsel and Mr. Poindexter inaudible to the reporter.)

Mr. Leonard: Your Honor please, it will be stipulated between the parties that G. W. Cotterill, whose number of the Defendant's Exhibit M appears as No. 125, and opposite whose name under the head "Seniority Date" appears the date 6/2/41, that [253] that man will be the junior Flight Radio Officer after the 12 men that Mr. Poindexter said were being laid off, will be laid off. In other words, Mr. Cotterill will continue after the lay-off and he will be the junior man.

Mr. Athearn: That is correct.

Q. (By Mr. Leonard): Now, Mr. Axe, at the time you had this conversation concerning which

(Testimony of Delvin Eugene Axe.)

you have testified with Mr. Cummings, what did you say your position was?

A. I was Assistant Communications Manager at that time, and that has since been changed to Division Communications Superintendent.

Q. Did that job embrace supervision? That was a supervisory position? A. That is right.

Q. Did it embrace supervision of ground personnel as well as flight personnel?

A. Yes, sir.

Q. Both groups? A. That is right.

Q. Mr. Cummings, you say, was present with two or three other persons whom you are unable to identify?

A. I don't recall who they were.

Q. You stated to Mr. Cummings after he showed you this memorandum you would honor any commitment Mr. Angus had made?

A. Not quite. I stated I would do my utmost to honor any [254] commitment Mr. Angus might have made.

Q. And he had it directly in his hand when you were discussing it? A. That is right.

Q. Did you at that time advise him or inform him that it had been found no longer necessary to assign him as a Navigator? A. No, I did not.

Q. At the time you knew he was assigned as Navigator, didn't you? A. That is right.

Q. You stated that at that time you would have been able to employ Mr. Cummings as a Flight Radio Officer if he had requested you to do so?

(Testimony of Delvin Eugene Axe.)

A. No, in 1946 we could not have. Later we could have when we added the additional men.

Q. I see. At the time you talked to him you couldn't have placed him as a Flight Radio Officer, is that correct?

A. Perhaps if I may——

Q. Go ahead.

A. ——amplify that answer a bit over a pure yes or no, I can help you. It was our intention at that time—my intention shall I say—to do everything possible to place each of these individuals upon application in the FRO group. At the same time I called their attention to the difficulties of placing them in that group at the time of the conversations. Later we [255] could have placed them, but there was no application.

Q. I understand. Now, if I understand you correctly, you had a discussion with Mr. Cummings in 1946. When in 1946? Can you place the month?

A. I can place it fairly accurately. I would say it was somewhere between the mid-point and later portion of 1946.

Q. Would you say that this defendant's Exhibit M, which is dated, November, 1946, had already been issued or had not already been issued at the time of this conversation?

A. I would say it had not been issued at that time.

Q. The data had been submitted to the Board but the list hadn't come out yet, is that your best recollection?

(Testimony of Delvin Eugene Axe.)

A. I have no information of the date of actually furnishing it to the board.

Q. I think the record shows it was December, 1945.

Mr. Athearn: I think the witness said that this was compiled as of December 31st, 1945, and it was submitted in the early part of 1946.

Q. (By Mr. Leonard): So that this conversation would have been after the early part of 1946?

A. Yes.

Q. And you told Mr. Cummings that you recommended he get back into the FRO group?

A. Yes, I did; and the same statement was directed to the other individuals. They were all there, as I previously stated. [256]

Q. And did you tell Mr. Cummings in order to get back into the FRO group he would have to make an application?

A. That is the usual process, yes.

Q. Did you tell him that?

A. I told him we would take action upon application.

Q. And he had directed your attention to Mr. Angus' memorandum and you said you would honor a commitment made by Mr. Angus to the best of your ability?

A. That is right.

Q. And I call your attention to the fact that when you told him that he had better file an application, that there was nothing in Mr. Angus' memorandum about his filing an application?

(Testimony of Delvin Eugene Axe.)

A. No, sir, that didn't enter the discussion. [257]

* * *

Q. Did he direct your attention to that—withdraw that. Did you read the memorandum he was discussing with you? A. Yes, I did.

Q. Were you aware of the fact when you had this discussion with Mr. Cummings that Mr. Angus' commitment provided he would resume his duty as a Flight Radio Officer "in the event it is a temporary nature and it is found not longer necessary to assign you as Navigator."? You were aware of the fact that Mr. Angus' commitment contained that language? A. I was aware of the language, yes.

Q. And you were aware of the fact that at the same time, that the navigation duty he was undertaking, he hadn't been declared by the Company at that time to be temporary?

A. I was aware of the management's intentions. That was the basis of my recommendation.

Q. I see. Did you know that Mr. Cummings was a Check Navigator at that time?

A. I can't say he specifically was or was not.

Q. Did you know during the period in question he was an Assistant Chief Navigator?

A. Yes, I did know that.

Q. Did you know that as Assistant Chief Navigator he was in a second supervisory position in the Navigation Division? A. Yes.

Q. Did you know Mr. Cummings was the man whose duty it was to [258] instruct pilots in navigation and check them on their navigational qualifications? A. Yes.

(Testimony of Delvin Eugene Axe.)

Q. That was the situation that obtained at the time you were talking to him. Then would you say under those circumstances it was no longer necessary to retain him in Navigation in 1946?

A. I am sure that had Mr. Cummings or any of the others in the group applied for a position which might be vacant or become vacant he would have been given every possible consideration.

Q. That is, by you, if he made an application?

A. If I may make this statement, it is always Company policy and has been for many years, if possible to place a man in any position for which he applied and for which he is qualified.

Q. Did you ever discuss with the Chief Navigator, Mr. Cummings' superior in the Navigation Department in the year 1946, whether or not he could spare Mr. Cummings, who was the Assistant Chief Navigator or a Check Navigator?

A. No, I did not.

Q. You had no conception of his duties in the Navigation Department or what was required of him, is that right?

A. I am sure——

Q. Withdraw that question. You don't know what effect it would have had in the Navigation Department had he been released or applied for transfer?

A. Yes. [259]

Q. Were you in the Navigation Department?

A. No, sir, but I was part of management.

Mr. Leonard: I think that is all.

Mr. Athearn: No further questions.

(Witness excused.)

Mr. Athearn: The defendant rests.

Mr. Leonard: May I have just one minute, Your Honor, please?

Mr. Athearn: Your Honor, at this time there have been a series of exhibits which I have offered for identification. Counsel for the plaintiff has been quoting copiously from them, as have I. If possible I would like to make a blanket motion that all of the defendant's exhibits marked for identification but not admitted now be admitted into evidence.

Mr. Leonard: If your Honor please, we have the objection we heretofore made with respect to them. They are relating to matters concerning collective bargaining, and I think the record is clear those that relate to the Flight Radio Officers group in the years 1944 to 1947 when these men weren't part of the group certainly are not binding on them; and those relative to the Navigation group, we submit, are immaterial, based upon the decision of the Court and——

The Court: I will give him a record. They may be admitted and marked, all of them.

Mr. Athearn: There have been several motions to strike that I have made. I hope I can make the motion now. As to [260] what the plaintiff submitted, that is all right. I would like to have the record show we have made the motion.

Mr. Leonard: We, too, have made motions, and for the record we renew the motion to strike.

The Court: Very well. [261]

Certificate of Reporter

I, Kenneth J. Peck, Official Reporter, certify that the foregoing page.. is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK,
Official Reporter.

[Endorsed]: Filed August 4, 1950. [262]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Petition for Removal of Civil Action, contains copy of Complaint for Damages for Breach of Contract and copy of Summons.

Answer.

Notice of Motion for Leave to File Amendment to Answer.

Minute Order of October 17, 1949—Pre-Trial Conference, Ordered Defendant's Motion to Amend Answer Granted.

Order Directing Amendment of Pleadings and Limiting Issues After Pre-Trial Conference.

Order for Entry of Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Order Extending Time to File Transcript of Record.

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

Defendant's Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V and W.

Reporter's Transcript for April 27, 1950.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of August, 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12641. United States Court of Appeals for the Ninth Circuit. Aubrey L. Charman, Stanley Cummings, John A. Hrutky and John F. Schwella, Appellants, vs. Pan American Airways, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California Southern Division.

Filed August 7, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12641

AUBREY L. CHARMAN, et al.,
Appellants,
vs.

PAN AMERICAN AIRWAYS, etc., et al.,
Appellees.

MOTION FOR ORDER DISPENSING WITH
PRINTING OF EXHIBITS

Come now the appellants in the above-entitled cause and through Norman Leonard, Esq., their counsel, and respectfully move the above-entitled Court for an order dispensing with the necessity for printing all of the original exhibits herein, and per-

mitting the said exhibits to be considered and referred to by the Court and counsel as though contained in the printed record on appeal.

This motion is supported by the stipulation of counsel for both appellants and appellee attached hereto.

Dated: August 11, 1950.

GLADSTEIN, ANDERSEN,
RESNER & LEONARD,

By /s/ NORMAN LEONARD,
Attorneys for Appellants.

[Title of Court of Appeals and Cause.]

STIPULATION RE PRINTING OF EXHIBITS

Whereas, the original exhibits in the above-entitled cause are voluminous and bulky; and

Whereas, a great deal of the relevant portion of said exhibits has been read into the record of the cause and will be printed in the record on appeal; and

Whereas, the proper, expeditious and most economical handling of this cause on appeal would best be served by not printing said exhibits but by permitting said exhibits to be referred to by the Court and the parties hereto as though they were actually printed and incorporated in the record on appeal; now therefore,

It Is Hereby Stipulated by and between the parties above-named, through their respective counsel, that the above-entitled Court may make its order

granting the Motion for Order Dispensing with
Printing of Exhibits.

Dated: August 10, 1950.

GLADSTEIN, ANDERSEN,
RESNER & LEONARD,

By /s/ NORMAN LEONARD,
Attorneys for Appellants.

ATHEARN, CHANDLER,
HOFFMAN & ANGELL,

By /s/ LEIGH ATHEARN,
Attorneys for Appellee.

It Is So Ordered:

/s/ WILLIAM DENMAN,
United States Circuit Judge.

/s/ CLIFTON MATHEWS,
United States Circuit Judge.

/s/ WILLIAM HEALY,
United States Circuit Judge.

[Endorsed]: Filed August 14, 1950.

[Title of Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF
POINTS ON APPEAL

Come now appellants and state the following as the points upon which they intend to rely on the appeal in the above-entitled cause:

1. The evidence does not support the Findings of Fact.

2. The Findings of Fact do not support the Conclusions of Law.

3. The Findings of Fact are not consistent with each other.

4. The Findings of Fact and the Conclusions of Law do not support the Judgment.

5. The trial court erred in finding that the written memoranda of January 21, 1941, between appellants and appellee did not constitute an agreement and undertaking by appellee.

6. The trial court erred in finding that the written memoranda of April 22, 1943, between appellants and appellee did not constitute an agreement and undertaking by appellee.

7. The trial court erred in failing to find that the appellee breached of the aforesaid agreements and undertakings.

8. The trial court erred in finding that the appellants did not show that they had suffered any damage by way of lost wages or by way of loss of

seniority privileges, severance pay privileges and other privileges by reason of their not being re-employed by the appellee.

9. The trial court erred in finding that the agreement of January 4, 1945, between the Pan American Airway Navigators Association and appellee replaced, superceded and was a novation of the previous agreements between appellants and appellee, and was so understood and reasonably would be so understood.

10. The trial court erred in finding that the rights of appellants under the memoranda of January 21, 1941, and April 22, 1943, were replaced, superceded and subject to a novation by the agreement of January 4, 1945, and that appellants had no rights to seniority and reinstatement save and except as provided in the agreement of January 4, 1945.

11. The trial court erred in failing to find that the appellants were not bound by the seniority list of November 19, 1946, which resulted from collective bargaining and mediation between the Flight Radio Officers Association and the appellee.

12. The trial court erred in failing to find that the appellants never saw the aforesaid seniority list.

13. The trial court erred in finding that, even if each of the appellants had been placed upon the aforesaid seniority list, none of them would have sufficient accrued seniority thereunder to have made him eligible for reinstatement in employment as a Flight Radio Officer.

14. The trial court erred in finding that men with greater accrued seniority than any of the appellants were unable to obtain employment because of lack of available positions.

15. The trial court erred in finding that the appellee is prevented by law from employing any of the appellants as a Flight Radio Officer.

16. The trial court erred in failing to find that had the appellee not breached its agreements of January 21, 1941, and April 22, 1943, with each of the appellants, each of the appellants would have been entitled to a place in the system seniority list which would have insured his reemployment in December of 1948, and his continuous employment at least to the time of trial and for an indefinite period of time thereafter.

17. The trial court erred in finding appellee has offered to each of appellants employment in the Communications Department of appellee at a grade commensurate with the length of service of each of said appellants, and that each of said appellants refused and declined to accept said offers when made.

18. The trial court erred in finding that the agreement of July 14, 1948, submitted to a board of arbitration for decision the question of what rights of seniority or retention of employment each of the appellants might have as against appellee.

19. The trial court erred in finding that the arbitration award of November 10, 1948, constituted

a determination of the rights of seniority or rights of retention of employment which each of the appellants might have as against appellee.

20. The trial court erred in finding that the contractual rights of each of the appellants arising from the written memoranda between each of them and the appellee of January 21, 1941, and April 22, 1943, were subject to the agreement between appellee and the Transport Workers Union of America of July 14, 1948, or were subject to the arbitration award of November 10, 1948.

Respectfully submitted,

GLADSTEIN, ANDERSEN,
RESNER & LEONARD,

By /s/ NORMAN LEONARD,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed August 16, 1950.

No. 12,641

IN THE

United States Court of Appeals
For the Ninth Circuit

AUBREY L. CHARMAN, STANLEY CUM-
MINGS, JOHN A. HRUTKY, and JOHN
F. SCHWELLA,

Appellants,

vs.

PAN AMERICAN AIRWAYS, INC.,
a corporation,

Appellee.

APPELLEE'S BRIEF.

ATHEARN, CHANDLER & HOFFMAN,

F. G. ATHEARN,

LEIGH ATHEARN,

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Attorneys for Appellee.

FILED

DEC 24 1950

PAUL R. O'BRIEN,

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No. 12,641

IN THE

United States Court of Appeals
For the Ninth Circuit

AUBREY L. CHARMAN, STANLEY CUM-
MINGS, JOHN A. HRUTKY, and JOHN
F. SCHWELLA,

Appellants,

vs.

PAN AMERICAN AIRWAYS, INC.,
a corporation,

Appellee.

APPELLEE'S BRIEF.

This brief filed on behalf of the appellee company will present a short restatement of the facts as disclosed by the record, followed by comments on the points of law set forth in the appellants' brief.

I.

RESTATEMENT OF FACTS.

An understanding of the facts in this case will be facilitated by a short restatement of the general background and the terminology used by the parties, as shown by the record.

A. Background and terminology.

According to the testimony¹ the appellee company is a carrier by air which has been engaged in flights across the Pacific Ocean since the historic flight of the China Clipper in November of 1935. The testimony was that there are several specific jobs to be done on the flight deck of large transoceanic planes, namely,

- (a) *Piloting* the plane, that is, physically flying it;
- (b) *Navigating* the plane, that is, making the observations and calculations to determine where the plane is and plotting its course to its destination;
- (c) *Radio communication*, either by radio telegraph (dot and dash) or by radio telephone (voice); and
- (d) *Engineering* operations, that is, watching the functioning of the engines.

The witnesses, including the appellants,² all described how these four above functions or jobs were combined or divided in various ways among the flight crews, depending on the type of plane, the availability of skilled men, etc. Sometimes, according to the witnesses, the job of piloting the plane and of making the observations for navigation were combined in one person, making him, therefore, a "pilot-navigator". If the jobs were separated, then the plane would have a "non-pilot navigator" as well as a pilot (and co-

¹Transcript of Record, pp. 240 to 245.

²Transcript of Record, pp. 81, 148, 153, 191, and 193.

pilot), a “non-pilot navigator” being a man who acts as navigator only and does not fly the plane also. The term “professional navigator” is also sometimes used, according to the evidence, instead of “non-pilot navigator”.

The same is true, according to the witnesses, as far as radio operation in the plane is concerned. There may be one individual who does nothing but operate the plane’s radio, whose actual title is “flight radio officer”, but who is usually referred to as an “FRO”. On other planes there is no crew member whose sole and exclusive function is to operate the radio, and this job is done by the pilot (or copilot).³

It was also testified that the various types of planes operated by the appellee company across the Pacific have used progressively smaller crews. The planes first used were described as having a crew consisting of a pilot, a copilot, a navigator, an engineer, an assistant engineer, a radio operator and a relief radio operator.⁴ The doubledeck Boeing Stratocruiser, which now flies across the Pacific, uses only “a pilot, copilot, engineer, and pilot-navigator”, the pilot-navigator being described as a man who can fly the plane as well as make the navigation calculations.⁵ This plane has no separate radio operator according to the testimony, and radio communication is handled by any one of the pilots, who merely picks up a microphone and speaks to his home base at will.⁶

³Transcript of Record, p. 244.

⁴Id. p. 242.

⁵Id. p. 243.

⁶Id. p. 244.

B. Employee crafts and groups.

Three employee crafts which the appellee company deals with were described by the witnesses⁷ as corresponding to the jobs mentioned above, namely

(a) pilots,

(b) navigators (i.e., those men who navigate but do not fly the ships, the "non-pilot navigators"), and

(c) radio operators (the so-called FRO group).

It was the testimony that until 1944 there were no unions representing these crafts, but that shortly thereafter independent associations represented each of the crafts. The navigators' craft, according to the witnesses, was first represented by an organization known as the Pan American Airways Navigators Association, and the radio operators' craft was initially represented by a separate organization known as the Flight Radio Officers Association.⁸ These two organizations both subsequently affiliated with the Transport Workers Union (CIO) which negotiated separate collective bargaining contracts with the appellee company for each of the two crafts.⁹

C. The jobs held by appellants.

The four appellants were originally employed by the appellee company as radio operators, that is their work on the plane was only to operate its radio, which was operated on the old dot-and-dash radio telegraph

⁷Transcript of Record, pp. 240 to 245.

⁸Id. pp. 93 to 94, and 215 to 220.

⁹Defendant's Exhibits D and G.

method.¹⁰ They were not then qualified to perform the more highly paid job of navigator.¹¹

As the wartime shortage of trained men began to set in, approximately in December of 1940, the appellee company adopted the policy described by the appellants in their complaint.¹² Instead of having both the piloting and navigating done by the same man (i.e., a "pilot-navigator"), the appellee company decided to separate the jobs by leaving the pilot free to do nothing but piloting and adding another man who would do the navigating but no piloting (i.e., the job designated by the confusing title of "non-pilot navigator"). As the appellants also testified, men already in the employ of the appellee company, and in particular, radio operators in the employ of its communications department, were given the opportunity to train for and qualify for this new job of "non-pilot navigator."

As will be shown in detail later, each of the four appellants qualified for this promotion and left his job as radio operator to become a non-pilot navigator. Each continued to serve in this capacity during the period of the war. When the war was over, the appellee company, as will be shown later, commenced flying new planes which did not require either a special man to do the navigating or a special man to work the radio, the pilots themselves doing both these jobs in addition to flying the plane. Hence, the four ap-

¹⁰Transcript of Record, pp. 244 and 245.

¹¹Id. pp. 79 and 90.

¹²Id. p. 3.

pellants find themselves with no job either as navigator or as radio operator, and this action was brought on certain re-employment rights claimed by them, claiming damages of \$160,000 each.

D. The alleged contracts.

The claim by the appellants to a right of re-employment arises out of two memoranda or circular letters sent by the appellee company to the appellants and to other employees similarly situated. The full text of the two letters appears in the appellants' brief,¹³ and there has never been any dispute that the letters were circulated as claimed by appellants or that they were authorized by the appellee company. The dispute in this case turns entirely around the questions of whether these letters ever gave the appellants any rights by contract and whether, if so, subsequent events have not terminated any such rights.

In the light of the finding¹⁴ by the trial court that the letters "did not constitute an undertaking" by the appellee company, and they were "intended as, and would reasonably have been understood as, merely the statement of future plan or intention," the events leading up to these letters must be examined carefully. The theory of the case advanced by appellants' counsel¹⁵ is that each of the appellants gave up a valuable consideration (i.e., his radio operator's job) in exchange for the promise of the appellee company to rehire him as a radio operator

¹³Appellants' Opening Br., Appendix, pp. i to v.

¹⁴Transcript of Record, pp. 48 to 50.

¹⁵Appellants' Opening Brief, pp. 19 to 31.

(when the wartime use of non-pilot navigators ended). Now let us look at the facts, as testified to by the appellants themselves, to see whether such offer and acceptance situation ever existed.

The appellant Charman testified that he formally applied for the training and job as non-pilot navigator more than a month before he ever heard any mention about the appellee company's policy regarding future employment of men who took the job.¹⁶ The appellant Hrutky said he heard about the possibility of a navigation job by the "grapevine" and formally applied for the job without inquiring or stipulating that he should have re-employment rights.¹⁷ The appellant Cummings in his testimony did not say whether he inquired about re-employment rights or that this motivated his making the transfer.¹⁸ The appellant Schwella, according to his testimony, took the navigation job and worked on it for more than eight months before he received any information regarding the appellee company's policy regarding re-employment,¹⁹ and then he received only the second letter.²⁰

So the picture painted by appellants' counsel of his clients' giving up their radio operator jobs because of a promise by the appellee company to rehire them as such at a later date, is simply not borne out by the facts. Let us now turn to what the appellee

¹⁶Transcript of Record, pp. 88 to 91.

¹⁷Transcript of Record, pp. 168 to 170.

¹⁸Id. p. 195.

¹⁹Id. pp. 208 to 209.

²⁰Plaintiffs' Exhibit 2.

company said. After three of the appellees had applied for and been assigned the new job as navigator, they received a general company memorandum containing the following statement:²¹

“This assignment may or may not be of a temporary nature, however, in the event it is of a temporary nature and it is found no longer necessary to assign you as Navigator, you will resume your duties as Flight Radio Officer with no loss of seniority or advantages which you now have.”

The trial court, in order to ascertain whether this statement rose to the dignity of a firm contractual undertaking to re-employ, of necessity looked to the general circumstances to see what the parties reasonably would have meant by the words used, given the custom and usage of the parties at the time. The testimony in this regard was clear and undisputed that, at the time the above quoted letter was issued, there were no collective bargaining contracts in existence governing this type of employee and that there were no formal rights to hold jobs on the basis of seniority. The word “seniority” as used in various bulletins of the appellee company, according to the testimony, related to length of service with the company giving rise to benefits such as vacation rights, sick leave, and the like.²²

In other words, the promise that there would be “no loss of seniority,” meant (and at the time could

²¹Plaintiffs' Exhibit 1.

²²Transcript of Record, pp. 215 to 216.

reasonably be understood) only that vacation, sick leave, and other such rights would be unimpaired. The word "seniority" then did not have the meaning which the appellants now seek to read into it, namely, a right by contract to hold a job in preference to all men hired at a later date.

The same can be said for the second letter circulated by the appellee company,²³ which said:

"After the war, if the position of Non-pilot Navigator should be abolished, we will re-establish you in the Communication Department in a grade commensurate with your length of service with the company * * *"

This second letter was received by the appellants months after they had given up their radio operators' jobs and were working as navigators. It can hardly be said to have motivated them to act or have been the promise in exchange for which they acted.

E. Subsequent agreement authorized by appellants.

After the appellants had gone to work as navigators certain events occurred which, it is contended, cut off any special employment rights they may have had or could claim. One thing that happened was that each of the appellants signed a card reading:²⁴

"I hereby agree that the Board of Directors of Pan American Airways Navigators Association shall represent me in the negotiation of a contract with Pan American Airways concerning wages and working conditions. I further

²³Plaintiffs' Exhibit 2.

²⁴Transcript of Record, pp. 93 and 171.

agree that the said Board of Directors or any agent or agents appointed by the Board shall have full authority to come to any agreement which they consider just and reasonable."

This authorization to negotiate a contract for "me" concerning "wages and working conditions" is as personal and individual as it could be. It can hardly be denied that within the scope of that authorization the agent could have entered into a separate, different and individual contract on behalf of each appellant. Further, the authorization is not limited to just wages and working conditions *as a navigator*, but is broad enough to cover the appellants' entire working relationship with the appellee company.

What the Navigators Association did, however, was to enter into a contract²⁵ with the appellee company which affected uniformly all navigators then in the employ of the appellee company, including each of the appellants. This contract was not limited to the wages and working conditions of the men while working as navigators, but also expressly covered the method of placement if and when the work as navigator ended. The terms of this new commitment required the appellee company only to "use its best efforts to place Navigators in available positions for which they are qualified when the policy of using Pilot-Navigators is resumed." The new contract agreed and referred to the procedure²⁶ by

²⁵Defendant's Exhibit B.

²⁶Defendant's Exhibit C.

which navigators would be given "ground employment" when their jobs as navigators came to an end.

The appellants do not contend that the appellee company failed to carry out this agreement to use best efforts to establish displaced navigators, and yet it clearly was a novation of, and superseded, any prior contractual rights they might have had. The appellants further acknowledge that they each knew their agent had negotiated this new agreement for them and did not repudiate it.²⁷

F. Establishment of seniority list.

Meanwhile, other events were transpiring, according to the record, which served further to restrict such rights as the appellants might claim to have back their old jobs as radio operators.

When the appellants left their jobs as radio operators there was no collective bargaining agreement covering that craft, according to the testimony. There were no "seniority" rights in the sense of a right by contract to hold a radio operator's job in preference to men later hired, and such "seniority" as existed served only to determine the length of time of vacation, sick leave, etc., and even this was purely a matter of company policy and not embodied in a contract.²⁸

After the appellants had ceased to be radio operators, the men in that craft formed a union and demanded for the first time collective bargaining rights.

²⁷Transcript of Record, pp. 94 and 172.

²⁸Id. pp. 214 and 215.

The appellee company, as a carrier by air, was required by the Railway Labor Act²⁹ to negotiate with this union. The negotiations culminated in an agreement³⁰ reached after the intervention of the National Mediation Board, requiring the appellee company to set up a seniority list for flight radio operators. The method by which the first seniority list was to be established required the appellee company to submit, to a joint union-company seniority board, employment information regarding flight radio operators who were or had been employed. This information, as furnished to the seniority board, was produced in court,³¹ and it shows that the appellee company included the employment history of each of the appellants on the information submitted to the seniority board.

At the time the seniority board rendered its decision, as to who should or should not have seniority as a radio officer in the employ of the appellee company, the appellants were of course not working as radio officers but as navigators. The board's seniority list³² was broken down into an "active" list and an "inactive" list. The list, as introduced in court, showed the "active" list as including only those men *then* working as flight radio officers, who were given seniority rank in the order of their employment. The "inactive" list was composed of those men who

²⁹45 USCA §§151 to 188.

³⁰Defendant's Exhibit E.

³¹Defendant's Exhibit V. See also Transcript of Record, pp. 219 to 222.

³²Defendant's Exhibit M.

had been flight radio officers but who were not then employed as such. This inactive list was further subdivided into a Group A and a Group B. Group A related to men in supervisory positions (it was stipulated the appellants were not in supervisory positions³³) and Group B was described in the exhibit itself as follows:

“On the Inactive List, Group B consists of those former Flight Radio Officers who accrued seniority as such but *who are no longer accruing seniority* due to the nature of the positions held by them since leaving the Flight Radio Officers group and those who have been released from the group due to reduction in force.” (Italics ours.)

This description would, of course, have fitted each of the appellants perfectly since each was a “former Flight Radio Officer” but no longer working as such, and hence he would have retained such seniority time as he had but would not have been “accruing seniority” while working out of the craft. Nevertheless, the name of none of the appellants appeared on the list, even though the appellee company had offered to the seniority board full information concerning each of the appellants.

The agreement establishing the seniority board³⁴ provided for the posting of the list for a period of 60 days during which employees could file protests. It was admitted that the list was so posted and that

³³Transcript of Record, p. 201.

³⁴Defendant's Exhibit E.

none of the appellants filed a protest concerning the omission of his name from Group B.³⁵ It was testified that the list was posted in a place to which the appellants had access and which they occasionally visited,³⁶ but no one testified that he saw any of the appellants look at the list and each of them denied any knowledge of it.

It is of particular significance that had any one of the appellants protested the omission of his name by the seniority board, he would by the terms of the list³⁷ have been placed only in Group B, the group which retained radio officer seniority but did not accrue seniority while working in another craft. It was further testified that when a man on the inactive list, Group B, moved over to the active list because he had gone back to work as a flight radio officer, it was the custom and practice of the seniority board to place him on the list at a point equivalent to men who then had accrued seniority equal to that which he had retained.³⁸ In other words, the construction of the seniority system adopted by the seniority board, and which the appellee company was bound to accept, placed the man returning to a flight radio job on the active seniority list not at a point based on his actual first employment date as a flight radio officer, but at a point arbitrarily determined on the basis of the time he would have gone to work

³⁵Transcript of Record, pp. 172 and 173.

³⁶Transcript of Record, pp. 229 to 231.

³⁷Defendant's Exhibit M.

³⁸Transcript of Record, pp. 233 to 238.

in that capacity in order to have accrued seniority time equal to that which he had been holding.

The existence of this seniority list effectively prevents the appellee company from now hiring the appellants as flight radio officers; and the list having been established pursuant to the Railway Labor Act, the list cuts off any re-employment rights the appellants may have had. This is true even though the appellants did not authorize the establishment of the list. The authorities on this point will be cited later.

G. Jobs offered to appellants.

As an additional ground for denying the claim of the appellants, the trial court found as a fact that the appellee company "offered to each of the plaintiffs employment in the communications department of defendant at a grade commensurate with the length of service of each said plaintiff; and that each said plaintiff refused and declined to accept said offers when made."

In other words, the court found that the appellee company had actually, and in fact, done just what the appellants claim the appellee company had undertaken to do. This finding was based on some most unusual testimony, the most remarkable being that of the appellant Hrutky, who testified³⁹ that in 1940 he had a ground job with the appellee company on Canton Island (a desolate spot in the mid-Pacific) earning some \$200 a month. By the "grapevine" he

³⁹Transcript of Record, pp. 168 to 170.

learned of the chance to get a flight navigator's job and urgently applied for it.⁴⁰ After holding a highly paid navigator's job from 1941 to 1948, he was unwilling thereafter to accept a ground radio operator's job from the appellee company at \$300 per month in Los Angeles.⁴¹ Rather than take that job he did nothing whatever during the entire year 1949, other than build himself a house in Oakland, as he himself acknowledged.⁴²

The appellant Charman blandly acknowledged on cross-examination that he believed he was entitled to receive \$160,000 from the appellee company and do no work for the rest of his life.⁴³ The appellant Cummings did not deny testimony that, in 1946 (when flight radio officers were needed), he ignored the admonition of the appellee's communications superintendent that he, and other similarly situated, should hasten to apply for jobs as flight radio officers.⁴⁴

In addition, it was undisputed that, by letter dated March 4, 1949,⁴⁵ the appellee company gave each appellant the opportunity to apply for ground radio operators' jobs paying approximately \$300 per month, and that this offer was refused by each appellant.⁴⁶ Their reasons for the refusal varied. One

⁴⁰Defendant's Exhibit O.

⁴¹Defendant's Exhibit K.

⁴²Transcript of Record, pp. 178 to 181.

⁴³Transcript of Record, pp. 95, 96, and 109.

⁴⁴Id. pp. 201 to 203, and 269 to 271.

⁴⁵Defendant's Exhibit I.

⁴⁶Defendant's Exhibit J.

did not like to move to Los Angeles, another did not like the job because it might last only a year, another wanted a job with a higher salary. None seemed to think it necessary to take the job in order to mitigate damages.

No doubt their judgment was colored by the fact that they regarded themselves as having a lifetime guaranteed income. How they ever read such an agreement into the 1941 and 1943 company memoranda, is difficult to see.

H. Arbitration and award.

Finally, the court found, as still another reason for denying the claims of the appellants, that they each had (through their authorized agent) submitted "to a board of arbitration for decision the question of what rights of seniority or right of retention of employment, if any, the plaintiffs and others might have as against the defendant."⁴⁷ The court found that the arbitrators had awarded each appellant \$2000 severance pay, which sums the appellee company was admitted to have paid.⁴⁸

The evidence supporting this finding was clear and undisputed. Specifically, the appellee company placed in evidence the award of a board of arbitration dated November 10, 1948.⁴⁹ At the time this arbitration occurred, each of the appellants was represented, as they each acknowledge, by the Transport Workers

⁴⁷Transcript of Record, p. 65.

⁴⁸Id. p. 42.

⁴⁹Defendant's Exhibit H.

Union of America (CIO).⁵⁰ The award contains a careful resume of the problem of 65 non-pilot navigators (or "professional" navigators), including the appellants, whose services were no longer required. It concludes that the appellee company shall not be required to continue to employ non-pilot navigators, but does require that the appellee company compensate them by severance pay. Specifically the award provides:⁵¹

"Upon dismissal each of the professional navigators employed by the Company will be given as severance pay the sum of \$2000 which will include the amount that would be payable under Article 18(f) of the parties' agreement of December 31, 1946; they will also receive payment for vacation earned or accrued but not taken and refunds due under the Company insurance and retirement plans."

The checks by which these \$2000 payments were made to each appellant were in evidence.⁵² As we understand the position of appellants' counsel, the appellants regard this \$2000 as compensating them only for the loss of the navigator's job, and that they are still entitled, under the 1941 and 1943 memoranda to jobs as flight radio officers. If this is the case, it is difficult to see how the loss of the navigator's job damaged them in any way. Indeed, according to their theory the flight radio officer's job would be just as good as the navigator's job.

⁵⁰Transcript of Record, pp. 41 and 42.

⁵¹Defendant's Exhibit H, p. 10.

⁵²Defendant's Exhibits N, R, S, T, U, and V.

Since the arbitration award speaks of “dismissal” and “severance pay”, plus refunds under “Company insurance and retirement plans”, it is quite apparent that the board of arbitration intended the \$2000 as a payment on complete severance of the employer-employee relation, and not as a payment on being moved from one position to another.

The appellants claim that they are differently situated from the other non-pilot navigators covered by the award, since each of the appellants worked for the appellee company as a flight radio officer prior to his employment as a navigator. This, of course, is an argument which should have been addressed to the board of arbitration. The award⁵³ does indicate on its face that the varying employment periods of the 65 navigators were considered. To be specific, the board said:

“Under the circumstances a sliding scale *based on years of service* or rate of pay seems inappropriate. Severance pay of \$2000 per employee in addition to accrued vacation allowance and refunds due under the Company insurance and retirement plan makes an appeal as fair, considering all pertinent conditions met in this situation.” (Italics ours.)

The board rejected the sliding scale “based on years of service”, and gave a uniform rate of severance pay to each navigator. Had the sliding scale been adopted, the years of service of each of the appellants as a flight radio officer would have been

⁵³Defendant's Exhibit H, p. 9.

an element to increase his severance pay. If the board of arbitration was unjust in declining to use a sliding scale, that injustice can hardly be remedied now by court action. Having thrown their employment rights into the arbitration proceeding, the appellants are bound by the award whether they like the decision or not, and the trial court correctly so found.

I. Lack of proof of damage.

Each of the appellants asked for damages in the staggering sum of \$160,000. The trial court, however, found that, as to each appellant, he "has not shown that he suffered any damages by way of lost wages by reason of his not being reemployed by the defendant, irrespective of whether the defendant did or did not agree to re-employ him."⁵⁴

In order to find themselves to be damaged, it was necessary for the appellants to adopt a construction of the flight radio officers seniority system which does complete violence to the way that list was shown to have been administered. If they believed they had re-employment rights as flight radio officers, it was, of course, incumbent upon them to see to it that their names appeared on the seniority list.

It was not denied that the appellee company furnished the data to the seniority board upon the basis of which that board could decide whether each of the appellants was entitled to a place on that list.

⁵⁴Transcript of Record, p. 52.

When the list appeared, the appellants were not included⁵⁵ and, although they had access to the list for the 60-day protest period, none of the appellants protested his omission from the list. There was surely no duty on the part of the appellee company to urge the appellants to protest.

The list itself shows that even if the appellants had by protest obtained a place upon the list, each would have been on the "Inactive" portion of the list, and in Group B thereof. The list⁵⁶ provides:

"On the Inactive List, Group A consists of those former Flight Radio Officers who are now in ground positions involving supervision of Flight Radio Officers and who therefore continue to accrue seniority."

It will be recalled that the list further provides:

"On the Inactive List, Group B consists of those former Flight Radio Officers who accrued seniority as such but who are no longer accruing seniority due to the nature of the positions held by them since leaving the Flight Radio Officers group and those who have been released from the group due to reduction in force."

Since it was stipulated that none of the appellants was, when the list was issued, in a ground position involving supervision of flight radio officers,⁵⁷ they at best would have been in Group B, the men in which "are no longer accruing seniority". In other

⁵⁵Defendant's Exhibit M.

⁵⁶Defendant's Exhibit M, p. 19.

⁵⁷Transcript of Record, p. 201.

words, they would have retained, but not accrued, seniority. It was not denied that the seniority time they would have so retained was as follows:⁵⁸

| | | | |
|----------|---------|----------|---------|
| Charman | 5 years | 2 months | 25 days |
| Cummings | 5 “ | 1 “ | 20 “ |
| Hrutky | 3 “ | 6 “ | 16 “ |
| Schwella | 4 “ | 7 “ | 15 “ |

It was further not denied that, when the navigator jobs of the appellants were terminated on November 15, 1948, the most junior man on the flight radio officers seniority list who was still employed *had 5 years, 7 months and 8 days service.*⁵⁹ The uncontradicted testimony was that, since that date, the employment of flight radio officers has been further curtailed.⁶⁰ It follows that regardless of whether the appellants should or should not have been placed upon the flight radio officers seniority list, none of them could have been actually employed, without doing complete violence to the terms of the list and without depriving another man of a job to which he was entitled.

Another element that must have been weighed by the trial court in computing damages, is whether employment as a flight radio officer is likely in any event to continue. Each appellant claimed \$150,000 in lost wages on the assumption that for the next twenty years he would be so employed. This has been shown to be directly contrary to the facts. The

⁵⁸Id. p. 264.

⁵⁹Id. p. 262.

⁶⁰Id. pp. 238 and 239.

diagram of the flight decks of aircraft used on the transpacific run⁶¹ clearly demonstrates that in the last ten years the number of men not engaged directly in piloting the plane has dropped rapidly and progressively.

On looking at this particular exhibit, the trial court judge turned to the appellants and said:^{61a}

“I can almost understand this situation gentlemen, in relation to your jobs. I can see them fading away with this modern method.”

Of course, the burden of proof was on the appellants to show that the jobs they claim to be deprived of could reasonably have been anticipated to exist for the period in which they claimed damages. This, they did not do.

The Civil Aeronautics Board recommendation of which the appellants' brief speaks⁶² does *not* say that flight radio officers as such must be employed, and by its very terms says that the Board does not recommend that a separate man be employed for this function who is not qualified for other duties.

Assuming the appellants had some contract rights which were not long ago cut off by union agreements and awards, damages would have to be measured by the rule set forth in cases like *McGee v. St. Joseph Belt Ry. Co.* (1936), 233 Mo. App. 111, 93 S.W. (2d) 1111, where the court said:

⁶¹Defendant's Exhibit W.

^{61a}Transcript of Record, p. 244.

⁶²Appellants' Opening Brief, p. 55 (Plaintiffs' Exhibit 12).

“If plaintiff has a right to recover, and the jury has so found, then he is entitled to the wages he would have received if the contract had been lived up to, less such remuneration as he has been able to receive for such work as his diligence would enable him to earn.

“There is evidence from which it can be concluded that with existing volume of business there was work sufficient to keep five engines employed. There is evidence from which it can be concluded that if the contract had been lived up to, that plaintiff’s seniority considered, he would have had regular employment.

It will first be noted that in the *McGee* case the court looked for evidence that there would be work sufficient “to keep five engines employed” which would have resulted in “regular employment” for the plaintiff. In the case at bar, the undisputed testimony was that there would be progressive shrinkage in the employment of flight radio officers and that it would soon reach the vanishing point.

As the *McGee* case also points out, damages claimed by a plaintiff must be reduced by “such remuneration as he has been able to receive for such work as his diligence would enable him to earn.” For example, the appellant Schwella acknowledged that his gasoline station netted him \$5,200 last year.⁶³ The appellant Hrutky, by his own admission, expects in “a year, but I hope it will be sooner” to have a full share in a tuna fishing enterprise, which

⁶³Transcript of Record, p. 212.

he said will net him as much as \$8,000 per year, plus his board and room.⁶⁴ Appellant Cummings said that he expects good business at his launderette concern,⁶⁵ and the trial court also apparently believed that, with reasonable diligence, the launderette business of appellant Charman will also prosper. When these deductions are made, the damages the appellants could claim would at most be negligible, and the finding of the trial court was therefore proper.

II.

LAW.

Let us now examine, one by one, the points of law raised in the appellants' brief as grounds for reversal of the judgment below.

A. THE FINDINGS ARE PROPER AND SUPPORTED BY THE EVIDENCE.

At the outset appellants' counsel assert the findings of the court below:⁶⁶

“* * * do not represent in a true sense findings of ultimate fact; on the contrary, they represent an expression of the various legal theories upon which the appellee tried its case below.”

⁶⁴Id. pp. 183 and 184.

⁶⁵Id. p. 189.

⁶⁶Appellants' Opening Brief, p. 21.

The counsel go on to say that the findings are "a series of conflicting views," and that it can not be told "which of the various theories of appellee the trial court adopted."

To see whether this criticism of the findings is valid, it is necessary to look first at the issues as framed by the pleadings. The appellants alleged in their complaint (a) the making of a contract by the appellee company, (b) the breach of that contract, and (c) damages to the appellants. The answer of the appellee company (a) denied the making of a contract, (b) denied that damages were suffered by the appellants, and (c) interposed four separate defenses as follows:

(1) *Novation (through an agent)*, in that the appellants had their authorized agent (the union) negotiate an agreement for them which superseded and was a novation of any contract rights they might have under the earlier memoranda.

(2) *Prevention (by federal law)*, in that, as an air carrier, the appellee company is subject to the Railway Labor Act and required to bargain with employee organizations certified by the National Mediation Board; and that an independent association and later the Transport Workers Union (CIO), of which the appellants are members, forced the appellee company to accept (after intervention of the National Mediation Board) a labor agreement setting up a seniority system which prevents the appellee company from now re-employing the appellants as flight radio officers.

(3) *Tender of employment*, in that employment has been offered to the appellants which they rejected.

(4) *Arbitration and award*, in that the rights of the appellants to re-employment were the subject of an arbitration proceeding, conducted under the Railway Labor Act, and that they were awarded by the board of arbitration the sum of \$2,000 each, which the appellee company paid.

It will be seen that none of these defenses is factually inconsistent with the other. That is, there is no inconsistency between denying there was a contract to begin with, and then alleging that, irrespective of this, later events cut off any rights which the appellants might claim.

The court held in favor of the appellee company on all the grounds, and there is by the same token nothing inconsistent in this. It will also be noted that the court's findings were quite careful to avoid any inconsistency. In this regard the court found first that the two memoranda "did not constitute an agreement or undertaking" and were not so intended or understood.⁶⁷ It next found, as to each appellant, that he "has not shown that he suffered any damages."⁶⁸ Then, proceeding to the separate defenses, the court found that a new agreement had been entered into that "was a novation of *any and all* agreements or understandings previously existing."⁶⁹

⁶⁷Transcript of Record, pp. 48 and 50.

⁶⁸Id. p. 52.

⁶⁹Id. p. 55.

The court found next that a seniority system had been established pursuant to the Railway Labor Act and the action of the National Mediation Board, that under it the appellants could not qualify for jobs, and that the “defendant is prevented by law * * * from employing any of the plaintiffs as a flight radio officer.”⁷⁰ The court found that the appellee company further had “offered to each of the plaintiffs employment” which met that claimed under the alleged agreement, and that each of the appellants had “refused and declined” such offer. Lastly, the court found that the appellants had each entered into an agreement which “submitted to a board of arbitration for decision the question of what rights of seniority or right of retention of employment, *if any*, the plaintiffs and others *might have*” as against the appellee company, and that the appellee company had complied with the arbitration award.⁷¹

It is abundantly clear from the foregoing that the court’s findings were carefully worded to eliminate any possibility of inconsistency. Since Rule 52(a) of the *Rules of Civil Procedure* requires the court to “find the facts specially” on every issue raised by the pleadings, it is difficult to see what the court could have done other than what it did.

The appellants urge that there is inconsistency where a court finds that there was no contract and, in addition, finds further that a defendant has some additional defense. We assume very little authority

⁷⁰Id. p. 63.

⁷¹Transcript of Record, p. 65.

is required to show that this is not the law. In *Borgstrom v. Bryan* (1929), 101 Cal. App. 164, 281 Pac. 432, the court said:

“The trial court made a finding in favor of the defendants on adverse possession, and it also made a finding in their favor as the holders of the record title. The plaintiffs contend that the two findings are contradictory. Of course that is not so.”

Similarly, in *Wilson v. Black* (1945), 49 N.M. 309, 163 Pac. (2d) 267, the court said:

“We find no inconsistency between the finding of the trial court that the indebtedness had been paid and another finding that the suit was barred by the Statute of Limitations, i.e. findings Nos. 3 and 6. It is merely to say that the debt has been paid, and moreover, and in addition, whether or not it has been paid, it is, nevertheless, barred by the Statute of Limitations. Either finding, substantially supported, would defeat plaintiff’s claim. If the plea of payment, and the plea of the Statute of Limitations are not inconsistent, and they are not * * * they may both be relied upon. * * * These two defenses were pleaded separately, as the rule provides, and upon the evidence taken the court sustained the contention of defendant as to both.”

The appellants’ brief goes on to refer to findings “prepared by winning counsel” and which “followed the pleadings of the prevailing party”,⁷² and there-

⁷²Appellants’ Opening Brief, pp. 22 and 23.

fore urges on this court “an independent consideration of the evidence adduced below”.⁷³

This contention is amply answered by the decision in *Simons v. Davidson Brick Co.* (C.C.A. 9, 1939), 106 F. (2d) 518, where this court said:

“Indeed, the appellant claims that he is entitled to disregard the findings of fact by the trial court because they were prepared by appellee’s counsel. ‘Obviously’, he states, ‘they were not made by the court and they are mere argument and prejudiced contentions’. He argues that we should disregard the findings stating ‘under these circumstances the Circuit Courts of Appeals proceed as if no findings had been made by the trial court.’ ”

This court went on to say:

“We cannot accede to this contention. The fact that opposing counsel has prepared and submitted findings of fact for the consideration of the trial judge, and that such findings of fact may have been adopted by the trial judge as his findings, in no way detracts from their legal force or effect. The characterization of the findings of fact adopted by the trial court as ‘appellees’ findings of fact’ is wholly unwarranted.”

It is therefore submitted that the findings are proper and stand unless clearly erroneous. This brings us to the matter of the support in the record for the findings and correctness of the legal conclusions drawn from the facts as found.

⁷³Id. p. 25.

B. THE ASSURANCES GIVEN THE APPELLANTS REGARDING RE-EMPLOYMENT ARE NOT CONTRACTS OF A BINDING LEGAL NATURE.

The appellants' entire case necessarily rests on the company memorandum dated January 21, 1941⁷⁴ to each appellant, to the effect that if he ceased to be a navigator "you will resume your duties as Flight Radio Officer with no loss of seniority or other advantages which you now have". The April 22, 1943 memorandum⁷⁵ adds very little, and since it came more than two years after the appellants had transferred to their new duties, it can in no sense be regarded as a contract between the parties.

As has been previously pointed out, the "seniority or other advantages" which the appellants had in 1941 were no more than the usual custom of the appellee company to observe length of service in giving vacations, sick leave, service awards, etc. There was no "seniority" in the sense of a binding seniority list. The testimony of the witness Fisher on this point was undisputed.⁷⁶

Even though the memoranda were in the form of positive assurances, that does not necessarily make them binding in a legal sense. Many assurances or statements are made which do not give rise to legally enforceable rights.

According to 17 *C.J.S.* 388 (§46):

"A mere statement of intention, or, as it is sometimes called, a 'promissory expression,' made

⁷⁴Plaintiffs' Exhibit 1.

⁷⁵Plaintiffs' Exhibit 2.

⁷⁶Transcript of Record, pp. 214 to 216.

without intention to contract, is not such an offer as may be turned into an agreement by acceptance. * * *

In *Broad Street N. Bank v. Collier* (1933), 112 N. J. Law 41, 169 A. 552 (Affd. 174 A. 900), the court said:

“A declaration of intention to act in a certain way, which does not show that the party who makes such declaration promises to act in such way, or intends to incur a legal liability obliging him to act in such way, is not an offer which can be accepted so as to make a contract.”

In *Ball v. Yates* (1947), 158 Fla. 521, 29 So. (2d) 729 (cert. den. 332 U.S. 774), the court said:

“A statement that an act would be done is not essentially a promise to do it, and not all promises are contractual.”

In view of the above, the assurances given the appellants never were such as would give rise to enforceable rights. What the appellants say in their brief,⁷⁷ to the effect that the existence of a contract is to be determined by what the parties say rather than what they mean, is all very true. But this still leaves for decision what the parties would reasonably have been understood to intend when, in 1941, they used the words “seniority or other advantages you now have.” This, in turn, depends on what the usage, practice and general understanding of the parties was

⁷⁷Appellants' Opening Brief, p. 27.

at the time. As is said in *Restatement of Contracts*, §246 (comment [a]):

“* * * Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear. * * *”

The trial court heard the testimony concerning the usage of the parties at the time in connection with the word “seniority”, and found that under the circumstances it “would not reasonably be understood and actually was not understood” to have the meaning appellants now claim.⁷⁸ Since there is testimony in the record supporting this usage, the finding of the trial court is not open to challenge here.

C. THE APPELLANTS EACH INDIVIDUALLY AUTHORIZED THE NAVIGATORS ASSOCIATION TO NEGOTIATE A NEW AGREEMENT FOR THEM.

Assuming for the moment the assurances given to the appellants rose to the dignity of binding re-employment contracts, let us see what would follow. As previously stated, it was stipulated that on or about October 27, 1944, each appellant executed and delivered to the Navigators Association an authorization card reading:⁷⁹

“I hereby agree that the Board of Directors of the Pan American Airways Navigators Associa-

⁷⁸Transcript of Record, pp. 48 and 50.

⁷⁹Transcript of Record, p. 171.

tion shall represent me in the negotiation of a contract with Pan American Airways concerning wages and working conditions.

“I further agree that the said Board of Directors, or any agent or agents appointed by the Board, shall have full authority to come to any agreement which they consider just and reasonable.”

It will be noted again that this authorization clearly speaks of the *individual* rights of each appellant, and uses the words “I hereby agree” and “shall represent me”. If the appellants had any individual rights under the prior assurances, they each definitely authorized the association to negotiate a wholly new agreement for them on the same subject matter. That agreement, entered into January 4, 1945,⁸⁰ was in the form of a commitment by the appellee company to use “its best efforts to place Navigators in available positions for which they are qualified when the policy of using Pilot-Navigators is resumed.” The procedure agreed upon⁸¹ referred to “ground employment” for former navigators.

The union agreement of January 4, 1945 was wholly at variance with the earlier unilateral memoranda, and therefore of necessity superseded and was a full and complete novation of any earlier rights. As is stated in *Riverside Coal Co. v. American Coal Co.* (1927), 107 Conn. 40, 139 A. 276:

⁸⁰Defendant's Exhibit B.

⁸¹Defendant's Exhibit C.

“As a general rule, when the new contract is in regard to the same matter and has the same scope as the earlier contract and the terms of the two are inconsistent either in whole or in a substantial part, so that they cannot subsist together, the new contract abrogates the earlier one in toto and takes its place, even though there is no express agreement that the new contract shall have that effect.”

The individual contracts claimed by the appellants and the later union contract are obviously “in regard to the same matter,” and since the “terms of the two are inconsistent,” it follows that there has been as complete an abrogation and novation of any prior individual claims as though the union contract had expressly so declared.

In their brief, the appellants assert⁸²

“That *subsequent* collective bargaining contracts and even arbitration awards such as are here relied upon do not deprive an employee of his rights established under a prior contract, is the settled law of this circuit.”

The appellants proceed to cite two maritime cases decided by this court, both of which are readily distinguishable from the case at bar and do not stand for the broad generalization imported into them by appellants. The case of *Steeves v. American Mail Line* (C.C.A. 9, 1946), 154 F. (2d) 24, is not in point for the following reasons:

⁸²Appellants' Opening Brief, p. 34.

(a) The dispute there was as to *how much* war bonus and repatriation payments the seamen should get. (This, unlike seniority, does not conflict with the rights of another employee.)

(b) This court clearly pointed out that the individual seamen had not authorized the union to submit their private rights to a board. (Here the appellants each personally authorized the union to bargain and change their individual rights.)

(c) The seamen had no chance to disaffirm what was done, since they were interned in Japan. (The appellants here had full opportunity to disaffirm the union's agreement but did not do so.)

(d) The Railway Labor Act gives collective bargaining contracts express legislative sanction, as will be shown later.

Agnew v. American President Lines (C.C.A. 9, 1949), 177 F. (2d) 107, is also not in point. There this court said:

“Appellees contend as they did in the *Steeves* case that an agreement between appellants' unions and the American President Lines made on February 21, 1942, that is *two and a half months after the capture of the appellants*, retroactively wiped out the provisions of the articles' rider which, as we hold, gave them the right to the war bonus during their captivity. For the reasons stated in *Steeves v. American Mail Line*, *supra*, 154 F. 2d, page 26, we find no merit in this contention.” (Italics ours.)

In addition to the novation which the appellants each individually authorized, there must also be considered the agreement with the Flight Radio Officers Association (now Transport Workers Union—CIO) which imposes a seniority system upon the appellee company which prevents placement of the plaintiffs as flight radio officers.

D. THE FLIGHT RADIO OFFICERS SENIORITY LIST ENTERED INTO UNDER THE REQUIREMENTS OF THE RAILWAY LABOR ACT BINDS THE APPELLEE COMPANY AND EXCUSES PERFORMANCE OF ANY CONFLICTING UNDERTAKINGS.

At the pretrial conference it was stipulated⁸³ that the defendant, as a carrier by air, during all times herein involved has been subject to the terms of the Railway Labor Act (45 USCA §§ 151 to 188). The rights and duties of the appellants, as well as of the appellee company, are therefore governed by that act, and not by the law governing maritime employment or other employment generally.

The trial court was referred to a case identical, in all substantial regards, with the case at bar, namely, *Lewellyn v. Fleming* (C.C.A. 10, 1946), 154 F. (2d) 211 (cert. den. 329 U.S. 715). There, a railroad employee sued for \$8,000 as the alleged value of seniority rights under an individual agreement entered into before the railroad was unionized. The employee contended:

⁸³Transcript of Record, p. 42.

“Appellant contends that his seniority rights acquired under his employment contract are vested, valuable property rights; that he has never been a member of the Brotherhood; never consented to the contract which deprived him of his seniority rights, and his suit is based upon the premise that the Railway Labor Act does not authorize the abrogation of his vested rights by a contract between the Brotherhood and his employer, and could not constitutionally do so under the Fifth Amendment.”

The court said:

“Here the Order of Railway Conductors was the statutory bargaining agent, and as such was authorized to enter into a contract with the Railroad Company concerning wages, hours and conditions of employment, and this undoubtedly included the authority to prospectively contract with reference to seniority rights of the members of the craft, whether members of the union or not.”

The court said further:

“The Act clothes the bargaining representative with ‘powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.’ In the exercise of its legislative functions, the statutory representative is charged with the public interest contemplated by the purposes of the Act, and is constitutionally bound to protect equally the interests of the members of the craft it is authorized to represent.”

The court said further:

“Private contracts relating to matters affecting interstate commerce are necessarily made in contemplation of transcendent Congressional power to regulate all matters and activities in commerce or affecting commerce. And such contracts, when validly made, can be enforced only in a manner not to conflict with the expressed Congressional policy.”

The court concluded:

“The appellant has no constitutional right to insist upon the observance of a private contract, the effect of which is to deny the incidence of a contract entered into in furtherance of an expressed Congressional policy, which the Congress is free to adopt.”

Counsel for the appellants, in the case at bar, has repeatedly stressed the fact that the appellants were not members of the Flight Radio Officers Association, and argues that because of this the seniority agreement of April 16, 1946⁸⁴ could not affect their rights. However, the plaintiff in the *Lewellyn* case also was not a member of the brotherhood that entered into the seniority agreement, and yet the court said that his personal agreement must have been made “in contemplation of the transcendent Congressional power” to regulate interstate commerce and could “be enforced only in a manner not to conflict with the expressed Congressional policy.”

⁸⁴Defendant's Exhibit E, p. 8.

For the appellants in the case at bar to enforce their individual claims to jobs would disrupt the orderly seniority system established under Congressional policy, and to force the appellee company to pay damages would penalize it for having obeyed the mandate of Congress. The *Lewellyn* case alone is a complete answer to the appellants' claims.

A little over five pages of the appellants' brief⁸⁵ is devoted to an attempt to distinguish the *Lewellyn* case, and in substance these are the points of distinction there made:

- (a) Lewellyn's seniority claim was based on custom and usage, not on a written document.
- (b) Lewellyn sought to exercise his seniority to get a promotion, rather than to step back into a job previously held.
- (c) The consideration given by Lewellyn for the railroad's promise of seniority was not the surrender of a job then held.

It is submitted that these are distinctions without a difference. The court in the *Lewellyn* case assumes that his seniority rights arose by a "prior individual contract of employment", and it therefore is immaterial whether this contract is oral or written, or is express or implied. The existence of a written document in the case at bar cannot therefore make it different from the *Lewellyn* case.

⁸⁵Appellants' Opening Brief, pp. 42 to 47.

Seniority is used equally to gain promotions, to hold a present job, or to pre-empt a job of inferior rank when a reduction in staff forces demotions. In 1917 Lewellyn received a promise of seniority which in 1942 he could have used to gain a promotion but for the fact that a 1938 union agreement had abrogated his contract rights. In the case at bar, the appellants claim that a promise of seniority given them in 1941 could be used by them in 1948 to pre-empt a radio officer's job when the termination of their navigators' jobs made them willing to accept this demotion, and the appellee company asserts that a 1946 union agreement abrogates such right as the appellants may have had. The principle involved is exactly the same whether the seniority would lead to a promotion or to preference on demotion. If the intervening union agreement cuts off prior contract rights in one case it should in the other.

Finally, to say that "there was no detriment to the employee in the *Lewellyn* case" but that there was "a definite detriment to appellants here when they transferred from one department to another," runs contrary to elementary principles of contract law. If a promise of seniority was made to Lewellyn, the consideration given by him in exchange for that promise was the act of accepting or continuing employment with the railroad, a thing he was not legally obligated to do. This is sufficient legal detriment to support the promise of seniority, and his position would not have been strengthened by yielding another job or transferring from one department to another (see: 1 *Williston on Contracts* [Rev. Ed.] 326, § 102A).

It follows that even if it be assumed that the appellants had binding individual contracts, which had not been lost by way of novation, in view of the seniority system now being administered pursuant to the Railway Labor Act, the "transcendent Congressional power" has abrogated those individual contracts.

The appellants also argue that⁸⁶

"There is certainly no doctrine in the law of contracts which permits a contracting party to be relieved of liability under a contract upon the ground that it subsequently entered into another contract with a third party which makes the performance of the original contract either difficult, onerous or impossible."

The above is unquestionably true as an abstract legal principle; however, we do not have here a case of a party who voluntarily entered into conflicting contractual obligations. The findings of the trial court on this point were most explicit, and the court said⁸⁷:

"That it is true that on the 26th day of June, 1946, the defendant and said Flight Radio Officers Association found that they were unable to agree upon the terms of a collective bargaining agreement then being negotiated between them; that upon said date they applied to the National Mediation Board for mediation services, as provided in said Railway Labor Act; that said National Mediation Board accepted said matter as N.M.B. case number A2381, and proceeded to act as provided in said Railway Labor Act; that on

⁸⁶Appellants' Opening Brief, p. 40.

⁸⁷Transcript of Record, p. 60.

or about October 28, 1946, in the presence of a representative of said National Mediation Board, said parties reached an agreement; and that on or about the 4th day of November, 1946, said matter was ordered closed and terminated by said National Mediation Board."

One of the prime purposes of the Railway Labor Act is "to avoid any interruption to commerce or in the operation of any carrier engaged therein." As the court said in the *Lewellyn* case:

"Congress was undoubtedly free to enact the Railway Labor Act in the exercise of its commerce powers, and the policy expressed therein cannot be thwarted or hindered by contracts between private parties."

The acceptance by the appellee company of the National Mediation Board's decision settling case number A2381, is not a voluntary act of making conflicting contractual commitments. In yielding to Congressional mandate, the appellee company must, as a necessary corollary, be given immunity from individual contract claims which conflict with that mandate.

III.

CONCLUSION.

The legal principle set forth in the *Lewellyn* case, while most interesting, is not necessarily the basis of a decision in the case at bar. The trial court found against the appellants on essential preliminary mat-

ters of fact, so it would be proper to dispose of this appeal without reaching the point involved in the *Lewellyn* case.

The trial court heard the witnesses in connection with the usage and background underlying the alleged agreements on which the appellants sue, and the court found that no contract arose in the first place. Similarly, the trial court found that the appellants had failed to adduce evidence of damage. These rather simple points are sufficient to dispose of this appeal, and the discussion above of the effect on individual employee rights of subsequent collective bargaining agreements may for that reason be unnecessary.

Indeed, the existence of these factual grounds for a disposition of this appeal should be sufficient, under the rulings of this court as stated in *Faivret v. First National Bank in Richmond* (C.C.A. 9, 1947), 160 F. (2d) 827, as follows:

“From an examination of the record, it is clear that the trial court based its conclusions largely upon an evaluation of the testimony given, much of it being conflicting * * * This Court has repeatedly held that, under such circumstances, it would not be inclined to disturb the findings of the lower court.”

There are of course additional grounds here for sustaining the decision of the trial court, namely, that the appellants authorized and acquiesced in a novation of any previous contract rights they may have had, and further that the appellee company has been required by the Railway Labor Act to make certain

union agreements as a corollary of which it is freed from any prior inconsistent individual agreements. These points make the case at bar quite different from the maritime cases previously before this court and which appellants cite.

It is submitted that the judgment below should be affirmed.

Dated, San Francisco, California,
December 27, 1950.

ATHEARN, CHANDLER & HOFFMAN,
F. G. ATHEARN,
LEIGH ATHEARN,
Attorneys for Appellee.

No. 12,641

IN THE

United States Court of Appeals
For the Ninth Circuit

AUBREY L. CHARMAN, STANLEY CUM-
MINGS, JOHN A. HRUTKY, and JOHN
F. SCHWELLA,

Appellants,

vs.

PAN AMERICAN AIRWAYS, INC. (a cor-
poration),

Appellee.

APPELLANTS' REPLY BRIEF.

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Appellee.

APPELLANTS' REPLY BRIEF.

In this brief we shall discuss only the various contentions made in appellee's brief; those of our points to which appellee has not responded we shall not repeat. Nor shall we re-argue the case as a whole since we are satisfied that our opening brief does that adequately.

I.

THE FACTS.

A. THE TECHNICAL BACKGROUND.

In the opening sections of its brief, entitled "Background and Terminology" and "The Jobs Held by

Appellants'', appellee asserts substantially that scientific improvements have rendered obsolete the services performed by appellants and consequently no employment is available for appellants irrespective of any other considerations. This contention underlies much of appellee's argument and appears in one form or another in various portions of its brief.¹ The facts in this regard are not as appellee pictures them.² In any case this argument is not dispositive of the issue before this Court. The issue is whether or not the record below supports appellants' contentions that each of them had a contract with appellee, that appellee breached it, and that each of them suffered damages as a result thereof.

To the extent that technological improvements in the field of radio communication are involved in the case at all, the record is clear that in April of 1949, after the breach and the institution of this action, appellee entered into an agreement with the Transport Workers Union³ which provided that the flight radio officers who were thereafter discharged should be conclusively presumed to have been discharged due to the advent of radio-telephony and should receive sever-

¹Appellee's Brief, pp. 2-6, 22-23.

²As we pointed out in our opening brief (pp. 54-56), and as the record amply bears out (Tr. 247-252), the progress of technology has not reached such a point as to permit appellee to dispense with the services of flight radio officers. On the contrary, the record is uncontradicted that as of the time of trial, some 18 months after appellee's breach of its contract and the institution of this action, appellee was employing a substantial number of flight radio officers, most of whom were junior in employment history to all appellants. (Tr. 274-275.)

³Def. Exh. F.

ance pay in the sum of \$3,000. This agreement follows the familiar industrial pattern of providing for severance pay for employees whose services are no longer required due to the introduction of labor-saving devices. If appellee rests its case upon the observation of the trial judge quoted at page 23 of its brief, then at least appellants are entitled to severance pay which they would have gotten upon discharge had they been re-established in the Communications Department as appellee promised to do.

B. THE CONTRACTS.

In the section entitled "The Alleged Contract",⁴ appellee misinterprets the contract it wrote by an undue emphasis on the word "seniority" appearing therein. Actually, the heart of appellee's promise to appellants appears in the phrase "You will *resume* your duties as flight radio officer, etc." The following phrase in the contract describes the circumstances which would obtain after appellants resumed their said duties. At no time has appellee permitted any of the appellants to resume their duties as flight radio officers, either with or without seniority.

Appellee also overlooks the real significance of the agreement of 1943 wherein appellee promised to "*re-establish*" each of the appellants in the Communications Department. This second contract could only have been taken by appellants to be (as it was) a re-

⁴Appellee's Brief, pp. 6-9.

affirmation of a promise previously made and a re-statement by appellee that the position of appellants with the company was secure. If it was not the intention of appellee by its communication of 1941 to make a legally binding commitment, then it is difficult to understand the significance of the 1943 letter. If in 1941 appellee was merely expressing a hope or intention or desire, it certainly did not so indicate two years later. The letter of 1943 demonstrates, as does the statement made by Axe in 1946⁵ that at no time until this litigation was instituted did appellee ever contend that its communication of 1941 was not intended by it to be a legally binding commitment.

**C. THE SUBSEQUENT COLLECTIVE BARGAINING
WITH THE NAVIGATORS.**

In the sections entitled "Subsequent Agreement Authorized by Appellants"⁶ and "Arbitration and Award",⁷ appellee falls into one serious error and neglects to mention one extremely important fact.

The error is the assumption that the signing by each of the appellants of an ordinary authorization card to a trade union for collective bargaining purposes constituted the appointment of that union as an agent for the purpose of negotiating with respect to appellants' private contracts with appellee. There is nothing

⁵Tr. 269-271.

⁶Appellee's Brief, pp. 9-11.

⁷Appellee's Brief, pp. 17-20.

either in the authorization card itself, in the conduct of the trade union involved, in the conduct of appellee, or in the conduct of appellants, to indicate that any of the parties thought or believed that by this authorization appellants were divesting themselves of control over the handling of their own contracts. The record in this case is no different from the record in *Steves v. American Mail Line*, 154 F. (2d) 24 (C.C.A. 9, 1946) and in *Agnew v. American President Lines*, 177 F. (2d) 107 (C.C.A. 9, 1949), cert. den. 70 S. Ct. 489 (1950). There is nothing here to show that the union authorization card signed by appellants was any different from the normal or usual union authorization card ever signed by any employee.

The Navigators Association grew as a result of the influx of temporary wartime employees, and all of the collective bargaining which took place between appellee and that association indicates that the problems uppermost in the minds of the parties were the problems of such employees. The very collective bargaining contract of January, 1945,⁸ shows that the parties were dealing with temporary employees concerning whom appellee would "use its best efforts to place" at the conclusion of hostilities.⁹ The solution of the problems of such employees was of no particu-

⁸Def. Exh. B.

⁹This is the answer to the contention (Appellee's Brief, p. 20) that appellants threw "their employment rights into the arbitration proceeding". It is clear they did no such thing and their acceptance of the award money "under protest" (Appellants' Opening Brief, p. 14) further demonstrates that to be the fact.

lar concern to appellants, since appellants did not expect to be affected by the post-war curtailment of professional navigators' jobs.

Furthermore, it is perfectly clear that the collective bargaining contract executed by the Navigators Association and appellee did not and could not constitute a novation of appellants' earlier contracts with appellee, because that agreement¹⁰ specifically makes reference to and incorporates the company memoranda of December 20, 1944,¹¹ which, as we pointed out in our opening brief,¹² specifically recognizes that the obligations assumed by the parties to the collective bargaining agreement "could not, of course, be permitted to stand in the way of promotion of employees already in training for them *or otherwise entitled to prior consideration * * **"¹³ Thus, as early as December, 1944, and January, 1945, in its dealings with the Navigators Association, appellee recognized that certain of its employees were entitled to prior consideration and so drafted the contract it was executing with the Navigators Association as to prevent its infringing on the rights of such employees. Thus, explicitly, rights such as are here asserted by appellants were recognized and exempted from the operation of the subsequent collective bargaining contracts. How, therefore, those contracts or the arbitration held thereunder could be regarded as a novation of contracts which

¹⁰Def. Exh. B.

¹¹Def. Exh. C.

¹²pp. 12-13, footnote 8.

¹³This observation concerning Defendants' Exhibit C is not even referred to in appellee's brief.

established such rights (even assuming that the agency was adequate), it is most difficult to understand.

D. THE FLIGHT RADIO OFFICERS' SENIORITY LIST.

In the section entitled "Establishment of Seniority List",¹⁴ appellee incorrectly asserts that the "Group B" list properly applies to appellants. That it does not is seen from the following factors.

First, that list applies only to those flight radio officers "who are no longer accruing seniority". Appellants were continuing to accrue seniority because they had been promised in writing by the appellee that *they would suffer no loss of seniority* and that *they would be re-established in a grade commensurate with their length of service with appellee*. Consequently, it cannot be said that they were no longer accruing seniority. On the face of it, therefore, the contention that the description of Group B would have fitted each of appellants perfectly, is not correct.

Second, *the fact is that appellants' names were never added to the Group B list* and the reason is perfectly obvious. It is the reason we have just stated. Appellants *did not fit into that group* for only one reason: *they were continuing to accrue seniority*, and it would have been a breach of appellee's contract with appellants to have included them on that list. In any

¹⁴Appellee's Brief, pp. 11-15.

case, as we pointed out in our opening brief,¹⁵ and this argument has not even been referred to by appellee, there was no showing that any persons on the list, or the union involved, offered any objection or placed any obstacle in the way of the inclusion of appellants' names on the list after the position of non-pilot navigator was abolished.

E. THE ALLEGED OFFERS OF EMPLOYMENT.

Under the section entitled "Jobs Offered to Appellants",¹⁶ appellee asserts that the trial Court's finding that jobs were offered to each of the appellants is supported by the evidence. We discussed the evidence in our opening brief and demonstrated that not only was there absolutely nothing in the record to support such a finding,¹⁷ but that such a finding was contrary to the practically undisputed testimony.

The alleged offers made in March of 1949 came after the breach had occurred and the suit was filed. Appellee having breached its contract, and appellants having elected to sue for the breach thereof, appellee could not thereafter seek to destroy appellants' causes of action by a belated offer of employment. *Sobelman v. Maier*, 203 Cal. 1 (1927); *Dyer Bros. Etc. v. Central, Etc.*, 72 C.A. 202 (1925); cf. *Manus v. Bendlage*, 82 C.A. (2d) 916 (1947).

¹⁵Appellants' Opening Brief, pp. 41-42.

¹⁶Appellee's Brief, pp. 15-17.

¹⁷Appellants' Opening Brief, pp. 51-54.

But more interesting is the fact that despite all of its protestations in other portions of its brief that it is prevented by operation of law (e.g., the Railway Labor Act) or the absence of available employment from offering employment to appellants, appellee had no difficulty in making such offers in March of 1949. Of course, the offers themselves did not meet appellee's obligations to appellants since instead of being offers of employment without loss of seniority or other advantage, or offers which would re-establish appellants in a grade commensurate with the length of service of each of them with appellee, the offers were merely offers of temporary employment.¹⁸

F. DAMAGES.

In the section entitled "Lack of Proof of Damages",¹⁹ appellee commits the same error as it does in the discussion of the seniority list. It assumes, contrary to the record and contrary to the agreement which it made with appellants, that appellants were not to accrue seniority during the period of time they were engaged as non-pilot navigators. Based upon that assumption it concludes that none of the appellants would have had sufficient simulated seniority to justify their employment by appellee after their navigators' positions were terminated. This flies directly in the face of the agreement made by appellee that appellants

¹⁸Tr. 180.

¹⁹Appellee's Brief, pp. 20-25.

would not suffer any loss of seniority and that they would be re-established in a grade commensurate with their length of service with appellee. The meaning of those promises is demonstrated by the appendix to our opening brief²⁰ which makes it clear that each of the appellants stands high upon appellee's seniority roster, and that of the 125 persons employed as flight radio officers by the appellee at the time of trial, appellants fall within the top 20%. As far as the actual damages to appellants are concerned, the record is clear that each of them suffered substantial monetary damage in the year between the time of the breach of the contract and the time the action was tried, and there was every indication that they would continue to suffer in the future.²¹

II.

THE LAW.

A. THE FINDINGS.

Appellee argues that because the trial Court made findings on every issue raised by the pleadings, the findings are proper, and that our argument that the findings are inconsistent is therefore not valid. Appellee apparently misapprehends our position. We take no issue with the fact that the trial Court found the facts specially on each issue raised by the plead-

²⁰Appendix. pp. vi and vii.

²¹These facts are pointed out in our Opening Brief, pp. 31-32, footnote 20, with appropriate transcript citations.

ings. Our contention is that the "facts" which the trial Court found cannot be sustained in the light of either the record or the decisions of the Supreme Court and the Circuit Courts of Appeals respecting such findings. The findings do not demonstrate the theory upon which the trial Court decided the case, and it is impossible to tell from them what that theory was. How can a Court find (1) that there was *no contract* and (2) that subsequent events constituted a *novation of the contract*? Or, how can the Court find (1) that there was *no contract* and (2) that thereafter the appellee *complied with the provisions of the contract* by tendering employment? Particularly, how could the Court find (1) that there was *no contract*; (2) that subsequent events constituted a *novation of the contract*; and (3) that a tender of employment satisfied appellee's obligation *under the contract*?

The authorities cited²² concerning, on the one hand, adverse possession, and on the other hand, the payment of a debt barred by the statute of limitations, do not represent inconsistent findings such as are found in this case. Therefore, those authorities are not in point.

We do not urge as decisive the fact that counsel for appellee prepared the findings and therefore the authorities cited²³ are not germane. We do point out the findings are inconsistent, do not reveal the basis upon

²²Appellee's Brief, p. 29.

²³Appellee's Brief, p. 30.

which the trial Court reached its decision,²⁴ and are the “delayed, argumentative and over-detailed documents prepared by winning counsel”²⁵ and are “but the most ultimate general conclusions of ultimate fact * * * [from which] it is impossible to tell * * * upon which underlying facts the Court relied * * *”²⁶

We further point out that the findings of fact contain many conclusions of law and inferences drawn by the trial Court from the evidence before it, and consequently are subject to review by this Court.²⁷

None of these contentions is answered by appellee’s brief.

**B. THE MEMORANDA OF JANUARY, 1941, AND APRIL, 1943,
ARE ENFORCIBLE CONTRACTS.**

Appellee concedes that the existence of a contract is determined by what the parties actually say rather than by what they may have meant,²⁸ but argues that what the parties said does not mean what the plain words used reveal. Appellee does not suggest that the words “You will resume your duties as a flight radio

²⁴As a matter of fact, insofar as one can tell from the observations of the trial judge made during the course of the proceedings before him, his comment quoted at page 23 of appellee’s brief (“I can almost understand the situation, gentlemen, in relation to your jobs. I can see them fading away with this modern method.”) was the real underlying basis for his decision. Yet this is not reflected in the findings. As we have pointed out above, this “finding” is not supported by the record, and in any case is not decisive of the issues here.

²⁵*United States v. Forness*, 125 F. (2d) 928 (CCA 2, 1942).

²⁶*Schneiderman v. United States*, 320 U.S. 118 (1943).

²⁷Appellants’ Opening Brief, pp. 20-25.

²⁸Appellee’s Brief, p. 32.

officer’’,²⁹ or “We will re-establish you in the Communication Department in a grade commensurate with your length of service with the company’’,³⁰ do not mean what they say. There is some suggestion, however, that the word “seniority” used in Plaintiffs’ Exhibit 1 has some special meaning. However, the testimony of appellee’s witness Fisher³¹ indicates that the word was used in its ordinary normal meaning in 1941. It had reference to a preferred position based on the length of service in connection with vacations, promotion, health plan, etc., etc., and there is nothing in the subsequent contracts to show that it had any other meaning at a later date. This is the usual meaning of the term in industrial relations.

We are certain that appellee did not intend to mislead this Court by the paragraph on page 33 of its brief in which it referred to the fact that the trial Court heard the testimony concerning the meaning of the word “seniority” and “found that under the circumstances *it* ‘could not reasonably be understood and actually was not understood’ to have the meaning appellants now claim.” For this statement appellee cites pages 48 and 50 of the transcript of record. Those pages contain Findings of Fact Nos. 6 through 8, and it is perfectly obvious from reading them that the quoted language in the finding did not refer to seniority at all, but referred to appellee’s general theory that the memoranda did not constitute contracts but

²⁹Plaintiffs’ Exhibit 1.

³⁰Plaintiffs’ Exhibit 2.

³¹Tr. 215, 216, 222-223.

were merely statements of future plan or intention. Therefore, it is not correct to say, as appellee does at page 33 of its brief, that the trial Court found the word "seniority" to mean something different from what appellants now claim.

To meet the overwhelming citation of California authorities to the effect that the documents in question do constitute a legally binding contract,³² appellee cites two cases, one from New Jersey and one from Florida, where there appears general language to the effect that a "declaration of intention" does not constitute a contract. In response we can only say that there is here obviously more than a declaration of intention. There is a legally binding commitment. In the second place, an examination of the cases cited by appellee shows how different they are from the case at bar.

In *Broadstreet National Bank v. Collier*, 112 N.J. Law 41, 169 A. 552 (1933), the plaintiff had written a letter to the defendant as follows:

"As I advised Mr. Charles McDermott to take the mortgage to your institution in order to settle his indebtedness as well as my note endorsed there, I feel I should be taken care of in the matter * * * I trust you will appreciate my position and take care of me * * *"

To which the defendant replied:

"I have your letter in re McDermott and shall be very glad to comply with your wishes."

³²Appellants' Opening Brief, pp. 25-31.

This was the entire correspondence exchanged between the parties and it is on this factual basis that the Court found no contract existed. We submit that that is certainly a far cry from the commitments made by the appellee here.

The Court in the New Jersey case said:

“An expression of desire or hope is not of itself an offer which will become a contract upon acceptance by the adverse party.”

Here there was no question of an expression of desire or hope, but rather a definite promise that appellants would “resume” their prior positions and that appellee would “re-establish” them in those prior positions.

Furthermore, in the New Jersey case, the Court pointed out that it was perfectly evident from the entire transaction that it was not in the mind of either party to change their legal relationships and that there was no consideration present. Neither of these two factors is to be found in this case.

In *Ball v. Yates*, 158 Fla. 529, 29 So. (2d) 729 (1947), cert. den. 332 U.S. 774 (1947), the question was whether or not an agency which could bind the defendant was created. In summarizing the facts the Court said:

“It appears that *on each occasion when confronted with any suggestion that he [the defendant] had entered into any agreement of a contractual nature * * * he disaffirmed and disavowed.* He states his plan was to proceed so that he could

quit at any time without liability and *his conduct throughout bears this out.*" (Italics supplied.)

In the case at bar, the exact contrary is true. Here, not only did the appellee make the commitment in 1941, but it reaffirmed it in 1943,³³ and again in 1946.³⁴

C. THE SUBSEQUENT COLLECTIVE BARGAINING AGREEMENT WITH THE NAVIGATORS ASSOCIATION.

Appellee argues that *Steves v. American Mail Line*, supra, and *Agnew v. American President Lines*, supra, are not applicable because the union agreement constituted a novation of the private agreements between appellee and appellants. We have already pointed out above that, first, there was no authorization on the part of appellants to the union to negotiate concerning these matters, and second, the collective bargaining contract could not constitute a novation because it expressly exempted from its operation the status of employees "entitled to prior consideration", e.g., precisely these appellants. Therefore, appellee's statement that the union agreement of January, 1945, was "wholly at variance" with the earlier memoranda³⁵ is an incorrect statement. It was not at variance with the earlier commitments because it expressly excluded such earlier commitments from its scope and opera-

³³Plaintiffs' Exhibit 2.

³⁴Tr. 269-271.

³⁵Appellee's Brief, p. 34.

tion. Therefore, there could be no inconsistency between the two documents and therefore the union agreement does not supersede the contract upon which appellants here base their claim.

Even if it did, the doctrine of the *Steves* and *Agnew* cases, *supra*, requires that this Court give full effect to private contracts entered into between appellants and appellee rather than to the terms of the subsequently executed collective bargaining agreement.

D. THE FLIGHT RADIO OFFICERS' SENIORITY LIST.

In discussing this phase of the case, appellee relies exclusively upon *Llewelyn v. Fleming*, 154 F. (2d) 211 (C.C.A. 10, 1946), cert. den. 329 U.S. 715 (1946). However, it overlooks the distinctions between that case and the case at bar, which distinctions we were at pains to point out in our opening brief.³⁶ The basic distinction, of course, is the fact that in the *Llewelyn* case the job which the employee was claiming was not in existence at the time the collective bargaining contract was entered into, and the employee certainly could not be regarded by virtue of the custom and understanding in the industry as having a perpetually continuing right to any jobs which might come into existence in the future. The employee in the *Llewelyn* case was in no different position from any other person employed by the company, and had no special

³⁶Appellants' Opening Brief, pp. 42-47.

personal or individual commitment from the company concerning the job in question. In our case, the appellants are not relying upon a general custom applicable to all employees, but only upon definite contractual commitments to each one of them as an individual. Furthermore, in our case, the jobs in question were in existence before the commitment was made, during the time the commitment was in effect, at the time the commitment was breached, and thereafter. In our case, the appellants are not insisting that a general custom and understanding be so interpreted and applied as to give them a right to a job which came into existence years after the collective bargaining contracts were entered into. In our case, the appellants are only asking that a commitment to them which it is both legally and physically possible for appellee to honor, be honored, or that they be awarded damages for its breach.

E. CONCLUSION.

Appellee indicates in its conclusion that in the last analysis, it is not relying upon the *Llewellyn* case³⁷ and falls back basically upon the trial Court's "findings" first, that there was no contract, and second, that there was no damage. It makes these assertions presumably because it feels that by relying upon such "findings" it will preclude this Court from making an independent examination of the record with

³⁷Appellee's Brief, pp. 43-44.

regard to those matters. But as we pointed out,³⁸ these “findings” do not preclude this Court from making such an independent examination. And insofar as the trial Court “found” that no contract arose, it was not making findings of fact but was drawing conclusions of law and therefore its “findings” are subject to review by this Court whether “clearly erroneous” or not. *Himmell Bros. Co. v. Serrick Corp.*, 122 F. (2d) 740 (C.C.A. 7, 1941).

We pointed out in our opening brief, based upon an abundant citation of California authorities,³⁹ that as a matter of law, the *only* conclusion which can be drawn from the documentary evidence is that a contract did come into effect in 1941 and was reaffirmed by appellee in 1943. Therefore, the first basis of appellee’s ultimate argument must fall as a matter of law.

Secondly, we pointed out that the record is undenied that each appellant did suffer substantial financial injury in the year 1949 and thereafter, as a result of appellee’s breach of its contracts.⁴⁰ Thus, the second of the arguments upon which appellee ultimately relies is also without merit.

From all of the foregoing, it appears that there is nothing in appellee’s brief which mitigates against the conclusion drawn in our opening brief that the trial

³⁸Appellants’ Opening Brief, pp. 21-25.

³⁹Appellants’ Opening Brief, pp. 25-31.

⁴⁰Appellants’ Opening Brief, p. 31, footnote 20.

Court's judgment is supported neither by the facts nor by the law, and for that reason it must be reversed.

Dated, San Francisco, California,

January 8, 1951.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

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~~ORIGINAL~~

No. 12648

United States
Court of Appeals
for the Ninth Circuit.

PERRY E. BURNHAM and L. EARL
BURNHAM,

Appellants,

VS.

J. HAROLD ABEGGLEN,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
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FILED

OCT 11 1950

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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BRANCH BIRD, ESQ.,
Gooding, Idaho,
For the Plaintiff.

J. D. SKEEN, ESQ.,
Salt Lake City, Utah,

OSCAR W. WORTHWINE, ESQ.,
Boise, Idaho,
For the Defendants.

In the District Court of the United States in and
for the District of Idaho
(Southern Division)

No. 2674

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and L. EARL
BURNHAM,

Defendants.

PETITION FOR REMOVAL

Come now the defendants above named, petitioners, and make and file this Petition for Removal of the above-entitled action from the District Court of the Fourth Judicial District in and for Blaine County, State of Idaho, in which it is now pending, to the District Court of the United States for the District of Idaho, Southern Division, and petitioners respectfully show to the Court:

1. That the above-named plaintiff instituted the above-entitled proceeding in the District Court of the Fourth Judicial District for Blaine County, Idaho, by filing a Complaint therein on the 13th day of June, 1949, and service of Summons in said cause was made upon the defendants herein on the 22nd day of June, 1949, at Hailey, Idaho. That the time for your petitioners to appear, answer or otherwise plead to the said Complaint has not expired and will not expire until the 12th day of July, 1949.

2. That the above-entitled action is an action of civil nature at common law, and the amount in controversy therein, exclusive of interest and costs, is in excess of \$3,000.00 and is the sum of \$6,000.00. The cause of action set forth and relied upon by the plaintiff is for the amount stated and is based upon an alleged contract for the payment of a real estate dealer's commission.

3. The plaintiff in said cause is now and was, at the time of the commencement of said action, and for a long time prior thereto, a resident of the State of Idaho; that the defendants in said cause, and the petitioners herein, are now, and at all times mentioned, have been and were, at the time of the commencement of said action, residents and citizens of the State of Utah. That Perry E. Burnham is a resident and citizen of Salt Lake City, State of Utah, and the said L. Earl Burnham is a resident and citizen of Bountiful, State of Utah.

4. That the controversies in this action and every issue of law and fact therein are wholly between citizens of different states and can be fully determined as between them.

5. Your petitioners file herewith a good and sufficient surety bond pursuant to the statutes in such cases made and provided with good and sufficient surety conditioned that the defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed. Your petitioners attach hereto a true

copy of the Summons and all pleadings and Orders served upon them or either of them in said action in the said District Court for Blaine County.

By reason of the premises, your petitioners are entitled to have this suit removed to the said District Court of the United States for the District of Idaho, Southern Division.

Wherefore, your petitioners pray that the said cause shall be deemed to be removed as of the date of the filing of this Petition and that the said District Court for Blaine County, Idaho, proceed no further therein.

/s/ J. D. SKEEN,

Attorney for Petitioners.

State of Utah,

County of Salt Lake—ss.

Perry E. Burnham and L. Earl Burnham, being first duly sworn, depose and say: That they are the petitioners above named; that they have read the foregoing Petition for Removal, know the contents thereof and that the same is true to the best of their knowledge, information and belief.

/s/ PERRY E. BURNHAM,

/s/ L. EARL BURNHAM.

Subscribed and Sworn to before me this 7th day of July, 1949.

[Seal]: /s/ EMILY URRY,
Notary Public.

[Endorsed]: Filed July 9, 1949.

[Title of District Court and Cause.]

NOTICE OF REMOVAL

To the Above-Named Plaintiff and to Everett B.
Taylor and Bissell & Bird, His Attorneys:

You and each of you will take notice that the defendants above named have filed their verified Petition in the United States District Court for the District of Idaho, Southern Division, containing a statement of the facts which entitle them to removal of the above-entitled cause from the District Court for Blaine County, State of Idaho, to the said United States District Court for the District of Idaho, together with a copy of all process, pleadings and orders served upon them, together with a good and sufficient bond in the penal sum of \$500.00 and sufficient surety conditioned that the defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed and by the filing of said petition and a copy of the said process, pleadings and orders served upon them and the said bond, said cause has been removed from the said District Court of Blaine County, Idaho, to the District Court of the United States for the District of Idaho, Southern Division, and the State Court shall proceed no further therein.

/s/ J. D. SKEEN,

Attorney for Defendants.

Affidavit of Mailing Attached.

[Endorsed]: Filed July 9, 1949.

[Title of District Court and Cause.]

AMENDED COMPLAINT

For his cause of action against said defendants, and as his amended complaint filed with consent of the defendants, the plaintiff alleges:

1.

That at all times herein mentioned plaintiff has been and now is a real estate broker duly licensed under the laws of Idaho, with his principal place of business at Hailey, Idaho.

2.

That on April 29th, 1948, plaintiff was employed by the defendants to procure a purchaser for certain real estate and personal property situate in said Blaine County; that said contract of employment was in writing, and as follows:

“J. Harold Abegglen,
Bonded Real Estate Broker,
Hailey & Blaine County, Idaho
Phone 193-W

In consideration of your agreement to list the property and to use your efforts to find a purchaser, I hereby appoint and constitute you my agent with right to sell the following described property for a period of Sixty days from date hereof, and thereafter until you receive from me a written notice terminating this agency and agreement.

Location: Gannett, Idaho.

Description: Cove Ranch, known to contain 3,313 acres, more or less. 1500 acres under cultivation, 1,800 acres in pasture and range, 1 five-room house and 1 four-room house with spring culinary water and all out buildings. Machinery and livestock can be purchased extra.

Said property to be sold for \$140,000.00 on the following terms: Cash \$25,000.00. Balance \$ at 4% on terms drawn up in contract or upon any other price, terms or exchange to which I may consent.

If said property is sold before the expiration of this agreement, or if it is sold after such expiration to any person with whom you have had negotiations hereunder, I agree to pay you 5% commission on said sale price, less \$1,000.00 and to furnish abstract showing good merchantable title to the purchaser. In the event of sale I will deliver warranty deed properly executed conveying the property to purchaser.

I reserve the right to sell this property direct without the aid of my agent, and in such event no commission is to be charged and I agree to give my agent immediate notice of such sale. I agree not to offer this property for sale at a less price than that hereon stated, unless such price shall first have been given to my said agent.

In case a deposit is forfeited, one-half of same shall go to said agent as commission and one-half to me, provided, however, that the agent's share

shall not exceed the amount of the above-named commission.

Dated and accepted: April 29, 1948.

/s/ PERRY E. BURNHAM,
Seller.

/s/ L. EARL BURNHAM,
Address.

May 15, 1948.

It is further agreed that the commission as stated on the reverse side of this paper be paid as follows:

\$2,000.00 when the first \$25,000.00 is paid and \$2,000.00 when the second \$25,000.00 is paid and the remaining \$2,000.00 when the full down payment of \$70,000.00 is paid on the purchase price of this Cove Ranch, making a total of \$6,000.00 commission.

Approved by:

/s/ PERRY E. BURNHAM.

/s/ L. EARL BURNHAM.

J. D. SKEEN,"

Witness.

3.

That thereafter and within the time mentioned in the above contract the plaintiff procured purchasers who were able, ready and willing to purchase said listed property, and thereupon the defendants entered into an agreement with said purchasers, which was satisfactory and agreeable to the defendants, a

true copy of which agreement is attached hereto, marked Exhibit A, and by this reference made a part hereof as fully as if copied herein verbatim.

4.

That thereafter and under date of August 12, 1948, the defendant and the purchasers of said property entered into a written agreement modifying certain of the terms and conditions of the agreement so entered into May 11, 1948 (Ex. A), the latter agreement being as follows:

“AGREEMENT

This Agreement made by and between Perry E. Burnham and L. Earl Burnham, as Parties of the First Part, and Carl H. Randell, Edward Randall and Oriel Randall, as parties of the Second part.

Witnesseth:

Whereas, the Parties of the First Part made and entered into an agreement with the Parties of the Second Part on the 11th day of May, 1948, whereby Parties of the First Part contracted to sell to the Parties of the Second Part real and personal property therein described and as security for the performance of said real and personal property to the Parties of the Second Part, the Parties of the Second Part individually undertook and agreed to execute and to deliver to the Parties of the First Part three negotiable promissory notes each for the sum of \$25,000.00 and each secured by a Mortgage upon

real estate located in Jerome County and Payette County, and

Whereas, Carl Randall, one of the Parties of the Second Part, failed and neglected to execute and deliver a mortgage covering real property alleged to have been owned by him and is not now able to give to the Parties of the First Part security for the payment of the note for \$25,000.00, and

Whereas, Edward Randall and Oriel Randall, Parties of the Second Part, and buyers, under the contract hereinabove referred to, have executed and delivered to the Parties of the First Part herein mortgages in accordance with the said Agreement, and

Whereas, it is the desires of the Parties hereto that said contract should be consummated and modified as herein provided,

Now, Therefore, it is mutually agreed as follows:

That the Parties of the Second Part hereby agree to, and by these presents do return to the Parties of the First Part, herein, and the sellers under the original contract referred to, the following described personal property, to wit:

- 16 Holstein Steers—Yearlings
- 12 Holstein Heifers—Yearlings
- 2 Guernsey cows, 3 & 4 years old
- 2 Jersey cows, 2 Years old
- 34 Holstein cows, 2 to 4 Years old
- 1 Purebred Holstein bull, 4 Years old
- 18 Holstein calves, 1 wk. to 4 Mos. old
- 14 Holstein Springer cows and heifers.

Provided that the said cattle shall remain upon the range near the Cove Ranch until the harvesting of hay and grain has progressed to a point that they can be put in the fields, at which time, they shall be removed from the range to the field and shall, at all times, be cared and provided for by the Parties of the Second Part. At such time as the Parties of the First Part deem it advisable to market the said cattle, they will sell them at the highest market price obtainable and out of the proceeds of the sale, they shall pay the actual and necessary costs of caring for and marketing cattle and credit the balance on the contract dated May 11, 1948.

It Is Further Agreed that the credit from the sale of said property as herein provided shall stand in lieu of the mortgage security which the said Carl Randall agreed to give under the terms of the original contract; that the mortgages given by Oriel Randall and Edward Randall and filed for record and recorded in the counties where the land is located shall be held and applied as provided in the contract dated May 11, 1948, and further, that one-third of the grain crop upon land now under lease to Nek Stelma and E. D. Kimbrough shall likewise be applied upon the purchase price of the property described in the said contract of May 11, 1948, less the property returned to the sellers as herein provided, and said contract as herein modified shall be deemed to be in full force and effect.

In Witness Whereof, the Parties hereto have

hereunto set their hands this Twelfth (12) day of August, 1948.

Signed in the presence of:

/s/ PERRY E. BURNHAM,

/s/ L. EARL BURNHAM,

Parties of the First Part.

/s/ CARL H. RANDALL,

/s/ EDWARD RANDALL,

/s/ ORIEL RANDALL,

Parties of the Second Part.

.....,

Witness.

5.

That upon the execution and delivery of the contract mentioned in paragraph three, copy of which appears as Exhibit A to this amended complaint, and in the latter part of May, 1948, said purchasers Carl H., Oriel and Edward Randell, and each of them, entered into possession of the said Cove Ranch, so described in Exhibit A hereto, together with the personal property therein described, and continued in possession of said real and personal property during the season of 1948, farmed said real property and cared for said personal property, and among other things said purchasers plowed two hundred (200) acres of land, milked, fed and cared for the dairy stock, and marketed the produce thereof, added two rooms to one of the dwelling houses on said ranch, cleaned, papered and painted

portions of the two dwelling houses and made various improvements thereto, paid all taxes in due season, the amount for the period being approximately \$800.00, paid water assessments, and generally operated said real estate and personal property in accord with the terms and conditions of the existing contract between the defendants and said purchasers.

6.

That payments were made from said purchasers to the defendants herein upon the purchase price of said land and personal property in approximately the following amounts and particulars: (1) on account of cattle and horses sold, with the proceeds thereof applied on said purchase price \$9,098.16; (2) on account of grain marketed, after expense was paid, with net amount applied upon the purchase price of said Cove Ranch and said livestock—\$11,753.83; (3) two truck loads of cattle sold about December 18, 1948, with the proceeds credited on the purchase price of said Cove Ranch and livestock approximately \$3,000.00; (4) on account of payments made on the Kraft Cheese Company account through the sale of dairy products, as authorized by said contract of purchase (Ex. A hereto) \$2,-131.94; that in addition to said credits upon said purchase price there is a balance which said purchasers have agreed to pay the defendants herein under the terms of the settlement agreement included hereinafter in the sum of \$6,000.00, which will also constitute a payment upon the purchase price of said Cove Ranch and livestock, making the total sums of

money and credits paid and to be paid by said purchasers to the defendants upon said purchase price of the Cove Ranch and livestock the total sum of \$31,983.93; that said total sum has been forfeited and paid or will be paid by said purchasers on account of the purchase price of said Cove Ranch and livestock.

7.

That thereafter and at the special instance and request of the defendants herein, and without the knowledge, consent or approval of the plaintiff, the defendant entered into an agreement with said purchasers whereby it was voluntarily and mutually agreed between the defendants and said purchasers that said contract (Ex. A) should be terminated and possession thereof restored to the defendants; that such settlement agreement was in writing and is in full as follows:

“Agreement

“This agreement made by and between Perry E. Burnham and L. Earl Burnham, parties of the first part and Carl Randell, Edward Randell and Oriel Randell, parties of the second part, witnesseth:

In consideration of the execution and delivery to the parties of the first part of a quit claim deed of the real estate located in Blaine County, Idaho, and known as the Cove Ranch, the parties of the first part agree to and do hereby sell and transfer to the parties of the second part all cattle now in their possession which cattle have heretofore been upon upon the Cove Ranch and said parties of the first

part further agree upon payment to them within one year of this date of the sum of \$6,000.00 with interest at the rate of 6% per annum to satisfy and discharge of record a real estate mortgage of Oriel Randell to the parties of the first part dated May 24, 1948, covering lands located in Jerome County, State of Idaho, given to secure payment of a note for \$25,000.00 which mortgage was recorded on May 26, 1948, in book 137 of Mortgages, page 525; and parties of the first part further agree to satisfy and discharge of record a mortgage from Edward Randell and Esther Randell to the parties of the first part covering lands in Payette County, Idaho, to secure payment of a note for \$25,000.00 dated June 8, 1948, and recorded in book 20 of Mortgages, page 543; and the parties of the first part further agree to cancel and deliver to Carl H. Randell a promissory note dated May 11, 1948, for \$25,000.00 payable to the parties of the first part upon and to satisfy and cancel a note for \$25,000.00 dated June 8, 1948, from Edward Randell and wife to the parties of the first part and also to cancel and return to Oriel Randell a promissory note dated May 11, 1948, payable to the parties of the first part for \$25,000.00.

Upon payment of the said sum of \$6,000.00 with interest as herein provided, all obligations growing out of the contract dated May 11, 1948, for the sale by the parties of the first part to the parties of the second part of the Cove Ranch located in Blaine County, Idaho, shall be settled, satisfied and adjusted and all obligations growing out of or con-

nected with the said contract will thereupon be satisfied and discharged.

If the payment of the said \$6,000.00 and interest as herein provided is not made within one year, the said mortgages and notes herein described shall be in full force and effect and subject to suit, judgment and foreclosure.

Dated this 4th day of April, 1948 (1949).

/s/ ORIEL RANDELL,

/s/ EDWARD RANDELL,

/s/ ESTHER RANDELL,

/s/ CARL H. RANDELL,

/s/ LOENA M. RANDELL,

/s/ PERRY E. BURNHAM,

/s/ L. EARL BURNHAM.”

8.

That thereafter the defendants sold said Cove Ranch to some third person, thereby putting it beyond the power of the defendants to comply with the sale contract between the defendants and the purchasers so procured by plaintiff.

9.

That no part of plaintiff's said commission of \$6,000.00 has been paid, though demand has been made upon the defendants and each of them for the payment thereof.

Wherefore Plaintiff prays that he have and re-

cover judgment against the defendants, namely, Perry E. Burnham and L. Earl Burnham, and each of them, in the sum of \$6,000.00, with interest thereon at the rate of 6% per annum from April 4, 1949, for costs of suit and all proper relief.

/s/ E. B. TAYLOR,

/s/ W. G. BISSELL,

/s/ BRANCH BIRD,

Attorneys for Plaintiff.

State of Idaho,
County of Gooding—ss.

Branch Bird, being first duly sworn upon his oath deposes and says: That he is one of the attorneys for the plaintiff in this action, and makes this vertification for and on behalf of the plaintiff for the reason that plaintiff is absent from the county where deponent resides and has his office; that he has read said amended complaint and knows the contents thereof and believes the statements therein contained to be true.

/s/ BRANCH BIRD.

Subscribed and sworn to before me this 20th day of August, 1949.

[Seal] /s/ RUTH BLISS WISWELL,
Notary Public,
Gooding, Idaho.

Exhibit A

Agreement

This Agreement made in duplicate this 11th day of May, 1948, By and between Perry E. Burnham and L. Earl Burnham, of Salt Lake City, Utah, herein referred to as Sellers and Carl H. Randell, Edward Randell and Oriel Randell of Idaho, herein referred to as Buyers.

Witnesseth

For the consideration hereinafter stated, the Sellers agree to sell to the Buyers, and the buyers agree to purchase the following described Real Personal and Mixed property located in Blaine County, State of Idaho to Wit:

Tp 1 N, R 19 E, Boise Meridian;

Sec. 17: All of Sec. 17 including tax lots 143 and 1032, 1030, 1031, 1028, 1029 and 145, excepting therefrom the right of way of the Ketchum branch of the O.S.L. Rd., through Sec. 17 and the $N\frac{1}{2}NE\frac{1}{4}$ and $SE\frac{1}{4}NE\frac{1}{4}$, and $N\frac{1}{2}NW\frac{1}{4}$.

Sec. 21: All of the $SW\frac{1}{4}$ and the $W\frac{1}{2}NW\frac{1}{4}$, including Lot 8, 9, 10, 11 and 12.

Sec. 28: All of the $E\frac{1}{2}$ including tax lots 163 and 1039, and all of that part of the $W\frac{1}{2}$ lying to the East of the right of way of the Ketchum Branch of the O.S.L. Rd., including tax lots 155, 159, and 160.

Sec. 29: All that part of the $NE\frac{1}{4}$ lying to the East of the right of way of the Ketchum branch of the O.S.L. Rd.

Sec. 33: All of the NE $\frac{1}{4}$ including tax lots 164, 165 and 166, but excluding therefrom the right of way of the Ketchum branch of the O.S.L. Rd.

Sec. 27: The SW $\frac{1}{4}$, the S $\frac{1}{2}$ NW $\frac{1}{4}$, the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ SE $\frac{1}{4}$.

Sec. 26: The N $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, the NW $\frac{1}{4}$ -NW $\frac{1}{4}$, the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ SE $\frac{1}{4}$.

Sec. 22: All of the E $\frac{1}{2}$.

Sec. 15: The SE $\frac{1}{4}$ and the SW $\frac{1}{4}$ NW $\frac{1}{4}$.

Sec. 14: The SW $\frac{1}{4}$, the S $\frac{1}{2}$ SE $\frac{1}{4}$, the NE $\frac{1}{4}$ -SE $\frac{1}{4}$, and the SE $\frac{1}{4}$ NE $\frac{1}{4}$.

Sec. 23: The N $\frac{1}{2}$ NW $\frac{1}{4}$, and the NW $\frac{1}{4}$ NE $\frac{1}{4}$.

Tp 1 N, R 20 E, Boise Meridian:

Sec. 19: Lot No. 1 in Sec. 19.

Tp 1 N, R 19 E, Boise Meridian:

Sec. 20: All of Sec. 20 lying East of the right of way of the Ketchum branch of the O.S.L. Rd., including tax lots 147, 150, 151, and 154, also NW $\frac{1}{4}$ -NW $\frac{1}{4}$ and tax lots 146 and 147 S. and E. of the O.S.L. Rd. line. Also all personal property described in inventory attached hereto.

Together with all Water Rights heretofore used upon or in connection with said land and including all improvements and appurtenances; also including 350 Taylor Grazing permits, and all personal property described in the Exhibit A attached to and made a part of this Contract. Which property has heretofore been known as the Cove Ranch.

The Sellers further agree to seek to recover ten (10) Shares of Sawtooth Grazing Association Stock and other permits claimed to belong to said property, and if said recovery is made in whole or in part, to transfer the same to the Buyers for the actual cost of the recovery of said property. All of said property is to be transferred subject to Share Crop Leases of wheat land, and the Sellers agree to provide houses for the said Share Croppers pursuant to the terms of a written Lease heretofore made.

The Buyers agree to pay for said property the sum of \$140,000.00 as follows: \$70,000.00 on or before two (2) years from date hereof, and \$70,000.00 in six (6) equal annual installments beginning May 15, 1949. All deferred payments shall bear interest at the rate of 4% per annum, payable annually.

The Buyers are to secure payment of the \$70,000.00, payable on or before two (2) years from date hereof with three (3) separate promissory notes for \$25,000.00; each made, executed, and delivered by the said Buyers and their Wives, and secured by Real Estate Mortgages upon the Real Estate described in Exhibit B, C, and D, attached to this Contract and made a part hereof. Said mortgages to be in usual form, and the status of the Title to the said Real Estate is to be disclosed by a report of abstractor for the Counties in which the said land is located, showing conveyances affecting the Title to said land since Deeds were received by the respective owners. The said notes and

mortgages to be executed and delivered to the Sellers prior to the talking of possession of said property by the Buyers.

Upon payment of the sum of \$25,000.00 on account of the purchase price of the said property, the Sellers agree to release either one of the three (3) mortgages designated by the Buyers and when the full sum of \$70,000.00 is paid on account of the purchase price of the said property, all of said mortgages shall be released of record.

Title to all of the said property shall be retained by the Sellers until the purchase price is paid; provided, however, that upon the payment of the said sum of \$70,000.00 all the personal property described in Exhibit A shall become the absolute property of the Purchasers. The Title to the Real Estate and all Grazing Permits shall be continued and thereafter held by Sellers, until paid for in full.

The Buyers agree to enter into possession of said property immediately upon the execution of this Agreement, and the delivery of notes and the mortgages covering the land described in the said Exhibits B, C, and D and to pay all taxes, water assessments, and all charges against the said property including such taxes and charges for the year 1948. To care for said land and other property in good husbandlike manner and to at all times safeguard and protect the said Grazing Permits by use and by payment of annual Grazing fees, by doing such other things as the Grazing service may require.

It is understood that there is approximately \$3,-

700.00 payable to the Kraft Cheese Company upon the purchase price of a part of the livestock described in Exhibit A, which sum is payable out of the receipts from milk sales. The Buyers agree to make said payments out of milk checks until the said purchase price is paid in full, and credit shall be given upon the purchase price for the amount so paid.

The Buyer shall not be authorized to sell or otherwise dispose of said livestock, or their increase, except upon written permission from the Sellers and upon condition that they replace the livestock so disposed of.

One-Third ($\frac{1}{3}$) of the wheat grown upon said property pursuant to Lease heretofore made, or one-third ($\frac{1}{3}$) of the proceeds of sale thereof for the year 1948 shall be applied on the purchase price of the property.

In the event of Buyers default in the payment of any installment of principal or interest, or in the payment of any special or general tax or assessment and such default shall continue after written notice and demand of payment for thirty days; the sellers may at their option terminate this Agreement and all payments of principal or interest theretofore made shall be applied as liquidated damages for the use and occupation of said premises, and the Sellers may re-enter and take possession of said property without Legal process, and may enforce the said mortgages. All improvements shall become a part of the real Estate.

Upon receipt of full payment of principal and

interest the Sellers agree to execute and deliver to the Buyers a good and sufficient Bill of Sale of the personal property and Warranty Deed to the Real Estate with Abstracts showing marketable Title thereto.

It is agreed that the Buyers accept the said property in its present condition and that there are no representations, covenants or agreements between the parties hereto, except as herein set forth.

In Witness thereof the parties hereto have set their hands this 12th day of May, 1948, in duplicate.

PERRY E. BURNHAM,
L. EARL BURNHAM,
Sellers.

CARL H. RANDELL,
EDWARD RANDELL,
ORIEL RANDELL,
Buyers.

/s/ J. D. SKEEN,
Witness.

It is agreed that installment payments as provided in the fourth paragraph shall begin Dec. 15, 1949, and shall be due Dec. 15 of each year thereafter until purchase price is paid.

Dated 3, 1948.

/s/ PERRY E. BURNHAM,
/s/ L. EARL BURNHAM,
/s/ CARL H. RANDELL,
/s/ EDWARD RANDELL.

Inventory Cove Ranch

April 14, 1948

Sheet No.

Called by

Entered by

Price by

Department

Location

Extended by

Examined by

Quantity

Description

| | |
|----|--------------------------------------|
| 16 | Holstiens, steers, Yearlings |
| 12 | Holstien heifers, Yearlings |
| 2 | Guernsey cows, 3 & 4 Years old |
| 2 | Jersey cows, 2 Years old |
| 34 | Holstein cows, 2 to 4 Years old |
| 1 | Purebred Holstein bull, 4 Years old |
| 18 | Holstein calves, 1 wk. to 4 mos. old |
| 14 | Holstein springer cows and heifers |
| 33 | 10 gallon milk cans |
| 2 | 10 Can milk coolers |
| 7 | Head draft horses, 3 to 12 years old |
| 2 | Saddle horses, 3 to 6 yrs. old |
| 5 | Colts, 1 to 3 years old |
| 2 | Saddle mares and colts |
| 1 | Model Allis Chalmer Tractor (C) |
| 1 | Model WC Allis Chalmer Tractor |
| 1 | Rubber-tired wagon and rack |
| 1 | Case hay baler |
| 1 | David Bradley hay loader |

| | |
|-------|-----------------------------------------|
| 1 | Case side delivery rake |
| 1 | International side delivery rake |
| 1 | 6 Ft. Martin ditcher |
| 1 | 3 bottom International plow |
| 2 | Sets harnesses |
| 1 | Twin 7 Mowing machine |
| 50 | Bundles baling wire |
| 45 | Bundles No. 1 cedar shingles |
| 20 | Ton lump coal |
| 12 | Pitchforks and shovels |
| 3 | Iron Crow bars |
| 1 | Pr. Wire stretchers |
| 1 | Hay derrick |
| 100 | Burlap sacks |
| 1 | 4-unit milking machine |
| 700 | AUM Taylor Grazing |
| 3,313 | Deeded Land (Cove Ranch) |
| 4,890 | Inches Decreed Wood River water |
| 5,400 | Inches By-pass water for 24-hour period |
| 1 | 5-room house |
| 1 | 4-room house |
| All | Out buildings, sheds and corrals. |

The above-figures and amounts are approved as correct.

By /s/ JACK B. LAYTON.

Gannett, Idaho, October 27, 1948.

Mr. Carl Randell, Please take 1-Holstein Bull to Twin Falls Stockyards Auction Sale.

Also 16 grade-Holstein 2 year steers, 1 grade guernsey cow, 6 Holstein cows. Have check made to

Perry E. Burnham and mail to Perry E. Burnham,
515 3rd Ave., Salt Lake City, Utah.

Very truly yours,

/s/ PERRY E. BURNHAM.

Affidavit of Mailing Attached.

[Endorsed]: Filed August 22, 1949.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants above named and make answer to the Amended Complaint herein as follows:

1. Defendants are not advised as to the matters and things set forth in paragraph No 1, and for want of information deny the same.

2. Making answer to paragraph No. 2, these defendants deny that they employed plaintiff on the 29th day of April, 1948, to procure a purchaser of real estate for them and deny that they signed a contract of employment on the said 29th day of April, 1948, or at any time prior to the 15th day of May, 1948. Defendants admit that they signed the instrument set out in paragraph No. 2 and allege that they were wrongfully induced to sign said instrument as hereinafter more fully set out.

3. Defendants deny that plaintiff procured pur-

chasers for said real estate who were able to purchase said property. Admit that they signed the agreement attached to the Amended Complaint as Exhibit A and allege that they were wrongfully induced to sign the said contract, Exhibit A by the misrepresentations of the plaintiff as hereinafter more fully set out.

4. Admit that they made the agreement with the said Carl H. Randell, Edward Randell and Oriel Randell set out in paragraph 4, and allege that they made said agreement for the reason that the said Carl H. Randell was in possession of their said property; that he had secured possession thereof through misrepresentations on the part of this plaintiff, and it was necessary for these defendants to repossess the said livestock and to save them from further losses because of misrepresentations hereinafter more fully set out.

5. Admit that the said Carl H. Randell, Edward Randell and Oriel Randell entered into possession of the said property shortly after the 15th day of May, 1948, and allege that the said Oriel Randell and Edward Randell withdrew from the management thereof immediately thereafter and that the said Carl Randell continued in possession of the said property from shortly after the 15th day of May, 1948, to the month of November, 1948, and allege that the said Carl Randell farmed part of the said property for his own use and benefit, taking all of the hay and grain raised except grain raised upon land leased on a share crop basis before the making

of the said contract on the 15th day of May, 1948.

The said Carl Randell grazed and fed a large number of cattle claimed to be owned by him on said property and fed and milked the milking stock included in the agreement set out in paragraph No. 4, and applied a part of the proceeds from the sale of milk upon an indebtedness to the Kraft Cheese Company. After the signing of the agreement set out in paragraph No. 4 on directions of these defendants and for compensation, the said Carl Randell delivered cattle to the purchasers thereof and these defendants received the proceeds from the sale of the said cattle.

6. Admit that the said Carl Randell made changes in the dwelling house on the said ranch and installed equipment therein and allege upon abandoning said premises, in 1948, and the Spring of 1949, the said Carl Randell removed from the said dwelling house substantially all he had added thereto.

7. Admit that they received the proceeds from the sale of cattle repossessed. Admit that they received the net rentals on property leased before the making of the contract of sale to the said Randells and allege that as a part of the settlement with the said Randells, the said Randells agreed to pay them the sum of \$6,000.00 and allege that the consideration therefor was in part thirty head of cattle belonging to these defendants and in the possession of the said Randells. Deny that the said sum of \$31,983.93 or any other sum has been forfeited by

reason of the sale of the said property to Randells. These defendants deny that they profited from said sale, but on the contrary, that because of the misrepresentations as hereinafter further set out, they suffered damages greatly in excess of the ability of the said Randells to pay, and allege that they terminated said contract by mutual agreement to minimize damages already suffered and to avoid suffering further damages.

8. These defendants admit that they made a contract for the sale of the said land after the termination of the contract of sale by the said Randells.

Further answering the said Amended Complaint, these defendants allege:

1. That prior to the 14th day of May, 1948, plaintiff represented that he had procured purchasers of the said Cove Ranch and requested defendants to meet him and the prospective purchasers at Eden, Idaho. That on or about the 15th day of May, 1948, defendants met the said plaintiff and Carl Randell, Edward Randell and Oriel Randell at Boise, Idaho, and plaintiff represented to the defendants that Oriel Randell was the owner of a farm at Eden, Idaho, which defendants had examined; that Carl H. Randell was the owner of a farm at New Plymouth, Idaho, and that Edward Randell was the owner of a farm at Parma, Idaho; that the said farms were free of mortgage indebtedness and proposed that the defendants sell the said Cove Ranch to the said Randells and take, as security

for the payment of approximately one-half of the purchase price thereof, the negotiable promissory note of each of the Randells for the sum fo \$25,-000.00, secured by a Mortgage for the amount of the note on each of their respective farms. That defendants, believing that said farms were free from indebtedness as represented by said plaintiff, accepted the said proposal subject to inspection of the farms of Carl H. Randell and Edward Randell, and plaintiff directed the defendants to a farm at New Plymouth, Idaho, which plaintiff represented was owned by Carl Randell, and to the farm of Edward Randell, at Parma, Idaho, and accompanied them in the inspection of said farms, after which the contract, Exhibit A, was drawn and signed and simultaneously, the contract of employment of the plaintiff as real estate agent set out in paragraph No. 2, with the notation at the end thereof, was drawn, signed and delivered to the plaintiff.

2. Said plaintiff and the said Randells, pursuant to the terms of the said contract, Exhibit A, undertook and agreed to provide descriptions of their respective farms and a record showing the status of the titles to each of the said farms, after which they agreed to execute and deliver the said mortgages. The plaintiff and the said Randells failed and neglected to furnish the said records and thereafter, on or about the 30th day of June, 1948, defendants procured such records and then found that the said Carl H. Randell was not the owner of the farm exhibited to the defendants, or any farm whatso-

ever. That the farm of the said Edward Randall was subject to a mortgage of approximately one-half of its value. That the title to the farm of the said Oriel Randell was in the name of his deceased wife, and said property was subject to a mortgage of approximately \$5,000.00 and parts of the said farm were being purchased upon contract upon which there was a large amount unpaid.

Immediately after the signing of the said contract, Exhibit A, the said Carl H. Randell, Edward Randell and Oriel Randell went into possession of the said Cove Ranch soon after which the said Edward Randell and Oriel Randell withdrew from the management thereof and entrusted the entire supervision and management to the said Carl H. Randell. On or about the 12th day of August, 1948, it became apparent to these defendants that the said Randells were without sufficient feed for the livestock included in the contract of sale and were without the means of caring for said property and to avoid loss of cattle and damages these defendants made a contract with the said Randells for the return to them of the cattle described in the said contract set out in Paragraph 4 and defendants thereupon repossessed said property and from time to time, sold the same. That the said Carl Randell made delivery of the cattle upon sale made by these defendants, and the defendants collected the proceeds of the sales.

4. During the month of November, 1948, the said Carl H. Randell abandoned the said Cove Ranch

and took up his residence elsewhere and during the winter of 1948-49, the said Randells left the said ranch and all personal property thereon without a custodian and great damages to the said personal property and ranch were sustained by reason thereof, and on the 4th day of April, 1949, the said Randells notified these defendants that they were unable to go on with the said contract of purchase and the said contract was cancelled by the agreement set out in paragraph No. 7.

5. That the plaintiff assumed to know that the titles to the farms of the said Oriel Randell and Edward Randell were free from liens and encumbrances and that the said Carl H. Randell was in fact the owner of the farm shown to them by the said plaintiff. That he took these defendants to the said farms, represented to them that the said farms were owned by the said Randells and free from indebtedness. That these defendants relied upon the said representations, and believed them to be true, and would not have signed the said contract of employment set out in paragraph No. 2 or the contract of sale of said land attached to the Complaint, as Exhibit A, and would not have let the said Carl H. Randell, Edward Randell and Oriel Randell in possession of said real estate and personal property but for said representation; that said representations were false and known by the said plaintiff to be false or they were made by the said plaintiff to the defendants in reckless disregard of the truth. That the farm of the said Edward Randell was mortgaged

for approximately one-half of the value thereof; that the farm of the said Oriel Randell was in the name of his deceased wife and parts were being purchased upon contracts and was subject to a mortgage and contract indebtedness in sums aggregating approximately 50 per cent of its value, and the farm shown to them as being the property of the said Carl Randell was not owned by the said Carl Randell.

After signing said contract, Exhibit A, and permitting the said Randells to go into possession of said property, defendants made every reasonable effort to minimize their losses by making the contracts for the return to them of the said cattle and for the cancellation of the contract. No forfeitures were made and no profits were derived by these defendants from said transaction, on the contrary these defendants suffered damages by reason thereof.

Wherefore, defendants pray that plaintiff take nothing by his Complaint and that they have their costs herein.

/s/ J. D. SKEEN,
SKEEN, BOYLE & RUSSELL,
Attorneys for Defendants.

State of Utah,
County of Salt Lake—ss.

Perry E. Burnham, being first duly sworn, deposes and says:

That he is one of the defendants above named; that has read the foregoing Answer to Amended Complaint, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

/s/ PERRY E. BURNHAM.

Subscribed and Sworn to before me this 30th day of August, 1949.

[Seal] /s/ EMILY URRY,
Notary Public.

My Commission expires May 14, 1953.

Affidavit of mailing attached.

[Endorsed]: Filed August 31, 1949.

In the United States District Court, District of
Idaho, Southern Division.

No. 2674

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and
L. EARL BURNHAM,

Defendants.

Appearances:

E. B. TAYLOR, ESQ.,
Hailey, Idaho.

W. G. BISSELL, ESQ.,
Gooding, Idaho.

BRANCH BIRD, ESQ.,
Gooding, Idaho,

Attorneys for the Plaintiff.

J. D. SKEEN, ESQ.,
Salt Lake City, Utah

OSCAR W. WORTHWINE, ESQ.,
Boise, Idaho,

Attorneys for the Defendants.

OPINION

June 14, 1950

Clark: District Judge.

The Plaintiff alleges in his amended complaint that he is, and was at all times mentioned in the

complaint, a real estate broker licensed under the laws of the State of Idaho, with his principal place of business at Hailey, Idaho; that on April 29, 1948, the defendants listed with him a certain ranch, together with certain personal property thereon, which ranch and personal property are described in the contract appointing plaintiff to act as agent of defendants in procuring a buyer. This "listing" contract or contract of employment was in writing and is set out in full in the complaint. It provides for a commission of 5% of the sale price of \$140,000.00, less \$1,000.00 or a total commission of \$6000.00. On May 15, 1948 the contract was modified to provide that the commission as stated in the original contract dated April 29, 1948, would be paid as follows:

“\$2,000.00 when the first \$25,000.00 is paid and \$2,000.00 when the second \$25,000.00 is paid, and the remaining \$2,000.00 when the full down payment of \$70,000.00 is paid on the purchase price of this Cove Ranch, making a total of \$6,000.00 Commission.”

That while the contract was in effect the plaintiff procured purchasers who were able, ready, and willing to purchase the listed property; that defendants entered into an agreement on May 11, 1948, with these purchasers, which agreement was satisfactory and agreeable to the defendants; and that thereafter, on August 12, 1948, this agreement was modified by a new written agreement between the same parties. The original agreement and the modified agreement are set out in full in the complaint.

Plaintiff alleges further that upon the execution and delivery of the agreement dated May 11, 1948, the purchasers entered into possession of the real and personal property concerned, did certain work on the premises, made certain improvements, paid all taxes due, paid water assessments, and in general operated the property in accordance with the contract of sale existing between them and the defendants; that certain payments were made by the purchaser to defendants on the purchase price and certain credits on the account were given by the defendants to the purchasers, all in the total amount of \$31,983.93, these payment and credits being set out in detail in the complaint; and that said amount has been forfeited and paid or will be paid by the purchasers on account of the purchase price of the real and personal property; that hereafter and at the special instance and request of the defendants, and without the knowledge, consent or approval of the plaintiff, the defendants entered into an agreement with the purchasers whereby it was voluntarily and mutually agreed between the defendants and the purchasers that the contract of sale should be terminated and possession restored to the defendants. In other words, plaintiff alleges that the contract of sale was cancelled without his knowledge or consent. Plaintiff further alleges that the defendants thereafter sold the property to some third person; that no part of plaintiff's commission of \$6,000.00 has been paid, though demand has been made upon the defendants and each of them for the payment thereof; wherefor plaintiff prays that he have

judgment against the defendants, and each of them, in the amount of \$6,000.00 with interest thereon at the rate of 6% per annum from April 4, 1949, and for costs of suit.

In their answer to plaintiff's amended complaint, defendants make certain denials and certain admissions, but principally and substantially they admit that plaintiff was their agent in the purported sale of the property but allege that they were wrongfully induced to sign the agreement making plaintiff their agent and that they were wrongfully induced to sign the contract of sale, in that plaintiff made misrepresentations as to the ability of the purchasers to comply with the terms of the contract of sale. Specifically, defendants allege that plaintiff made misrepresentations in the following particulars: That on or about May 15, 1948, plaintiff represented to defendants that one of the purchasers, Oriel Randall, was the owner of a farm at Eden, Idaho whereas the title to the farm was actually in the name of his deceased wife and the property was subject to a mortgage of approximately \$5,000.00 and parts of the farm were being purchased under contract upon which there was a large amount unpaid; that plaintiff at the same time represented to defendants that another of the purchasers, Carl H. Randall, was the owner of a farm at New Plymouth, Idaho, which plaintiff exhibited to defendants as Carl H. Randall's farm, whereas he was not the owner of the farm exhibited or of any farm whatsoever; that plaintiff at the same time represented to defendants that another of the purchasers, Edward Randall, was the owner of a farm at Parma, Idaho.

whereas the property was in fact subject to a mortgage of approximately one-half of its value; that plaintiff represented such farms to be free of mortgage indebtedness and proposed that the defendants sell the property here concerned to the purchasers and take, as security for the payment of approximately one-half of the purchase price thereof, the negotiable promissory note of each of the three purchasers for the sum of \$25,000.00 to be secured by a mortgage for the amount of the note on each of their respective farms; that defendants accepted the proposal because they believed, from the representations made by plaintiff, that the farms were free from indebtedness; that the purchasers agreed to execute and deliver mortgages on their farms; that they did not do so, although they went into possession of the defendants' ranch and personal property immediately after signing the contract of sale. Defendants admit entering into the modified agreement, or contract of sale, on August 12, 1948, with the purchasers; and admit the cancellation of the contract. They deny that any forfeitures were made by the purchasers and they allege that no profits were derived by the defendants from the transaction, and that on the contrary the defendants suffered damages by reason thereof.

Narrowed down, the issue in the case is this: Plaintiff claims his commission under his contract of employment, alleging that he procured bona fide purchasers and that a bona fide sale was made to these purchasers procured by him. Defendants admit that plaintiff was employed as their agent and

that he procured purchasers, but allege that the purported transaction was induced by material misrepresentations by the plaintiff, on which the defendants relied; that the representations were false and were known by plaintiff to be false or were made by the plaintiff in reckless disregard of the truth; that there was therefore no bona fide sale and the plaintiff did not earn a commission. The alleged misrepresentations related to the ability of the purchasers to furnish mortgages on the three farms as referred to earlier herein.

The evidence *is* conclusive that two of the purchasers, Oriel Randall and Edward Randall, did execute and deliver mortgages on their respective farms as agreed in the original contract of sale. These two mortgages are, in fact, still held by the defendants. It is also conclusive from the evidence that by agreement dated August 12, 1948, the earlier agreement pertaining to the furnishing of mortgages by each of the three purchasers on their respective farms was modified by mutual agreement of the defendants and the purchasers to provide for certain other securities in lieu of the mortgage which, under the original agreement, Carl Randall was to have executed and delivered to the defendants. It cannot be doubted that by entering into this modified agreement the defendants acquiesced in the substitution of securities and waived any right they might have had to rescind the original contract of sale. In short, as late as the date of this modified agreement, August 12, 1948, defendants still regarded the Randall brothers as bona fide purchasers, "able,

ready and willing" to buy the property. It must also be noted that at the time the contract of sale was cancelled by mutual agreement of the defendants and the purchasers, the purchasers were not in default on the contract in any respect, the only previous default having been waived by defendants as discussed above. It is clear from the evidence that the agreement to cancel the contract was entered into without the knowledge, consent or approval of the plaintiff.

There is some dispute as to how much was paid by the purchasers on the purchase price. Exhibits 14 and 15 show payments and credits totaling \$22,383.16; it would appear from other evidence to amount to well in excess of \$25,000.00.

The pertinent facts are that plaintiff was engaged by defendants, under a contract in writing, to sell certain property; that he procured purchasers, an agreement was entered into and later modified; that the purchasers went into possession of the property immediately following execution of the original agreement; that the purchasers made substantial payments on the purchase price, the exact amount of which is subject to dispute; that subsequently, and while the purchasers were not in default on their contract to purchase, the contract was cancelled with the mutual consent of defendants and purchasers and without the knowledge, consent or approval of the plaintiff.

The question before the Court is the rights of a real estate broker to his commission under the state of facts existing here. The general rule is that after

a contract between the principal and a customer produced by the broker has been concluded, its subsequent modification or cancellation does not defeat or affect the right of the broker to a commission, unless it is done at his request or with his consent or knowledge and acquiescence.

The Court is of the opinion that the plaintiff was free from misconduct in his dealings with the defendants, also if there was any misunderstanding the defendants acquiesced therein when they entered into the modified agreement with the purchasers after acquiring actual knowledge of the failure of Carl Randall to deliver the mortgage on his farm, and any claims of misrepresentation were thereby waived, and that the case at bar falls within the general rule just stated. It is true that the contract of employment on which plaintiff relies provided for the payment of commissions pro rata as the purchase price was paid and that \$2000.00 of the commission was to have been paid when \$25,000.00 was paid on the purchase price. If plaintiff's recovery were to be limited by this provision of the contract of employment, it would be of primary importance to determine exactly how much was actually paid in the form of cash and credits. However, the rule has been laid down that where a broker's contract with the owner provides for payment of commissions pro rata as the purchase price is paid, the broker is entitled to his entire commission upon cancellation of the owner's contract with the purchaser by mutual consent of the owner and purchaser when the contract is cancelled without any agreement with the

broker, at least where the purchaser is not yet in default. *Ratzlaff v. Trainor-Desmond Co.*, 183 Pac. 269. This rule is applicable to the case at bar, for the defendants have abandoned their contract of sale and have made it impossible to carry out the contract with the purchasers procured by the plaintiff. The cancellation of the contract by mutual consent of the defendants and purchasers was no concern of the plaintiff. If he earned a commission at all, he earned it on the full price for which the property was sold, and his commission could not be reduced by the subsequent transaction.

It is therefore immaterial as to what amounts have been paid or credited and are yet to be paid on the purchase price, except in so far as the payments and credits indicate the bona fide nature of the transaction and show that the purchasers were not in default at the time the contract was cancelled. Plaintiff is entitled to recover his full commission; interest will be allowed from date of judgment.

Counsel for Plaintiff will prepare findings of fact, conclusions of law and decree and serve copy on opposing counsel; submitting the original to the Court for approval.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing before the court sitting without a jury at Boise, Idaho, February 8, 1950, plaintiff appearing in person and by his attorneys, E. B. Taylor and Bissell & Bird, and the defendants appearing in person and by their attorneys, J. D. Skeen and Oscar W. Worthwine; and the court having heard and considered oral and documentary evidence, and having considered written briefs, and having heard and considered oral arguments, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1.

That at all times hereinafter mentioned the plaintiff was a real estate broker, duly licensed by the laws of Idaho, and with his principal place of business at Hailey, Idaho.

2.

That on April 29, 1948, the plaintiff was employed by the defendants, under a contract in writing, to sell certain real and personal property, generally known as the Cove Ranch situated in Blaine County, Idaho; that copy of said contract or listing appears as a part of paragraph two of the amended complaint, such contract constituting the plaintiff an

agent of the defendants with authority to sell said ranch and the equipment and livestock thereon for the sum of \$140,000, and providing that the plaintiff should receive a commission of \$6,000 in the event he sold said property.

3.

Thereafter the plaintiff contacted Randall Bros. and interested them in purchasing the property so listed with the plaintiff by the defendants, and after preliminary negotiations and discussions, and inspection of the ranches owned by the Randall Bros. an agreement satisfactory to the defendants was entered into by the defendants as sellers, and Carl H. Randall, Edward Randall, and Oriel Randall, as purchasers, under date of May 12, 1948; that a copy of the latter agreement appears as Exhibit "A" to the amended complaint, the substance thereof being that defendants sold to said Randall Bros. the Cove ranch, comprising 3,313 acres of irrigated, pasture, and ranch lands, together with the livestock and farm machinery situate thereon (such personal property being listed in a written inventory prepared at the time of said sale) together with water and grazing rights and all appurtenances; that the purchase price stated in said agreement was \$140,000, of which \$70,000 was required to be paid on or before two years from date, and the balance was required to be paid in six annual installments beginning May 15, 1949, with interest at 4%; that by a supplemental agreement to said contract, dated December 3rd, 1948, the contracting parties agreed that the installment so maturing May 15, 1949,

should be postponed until December 15; this agreement of May 12, 1948, also required the Randall Bros. to secure said payment of \$70,000 with their respective individual notes, secured by mortgages on the ranches then owned by said Randall Bros.; and said agreement also contained directions for application upon said purchase price of the landlord's share to be received from sale of grain from portions of said Cove ranch then under lease, and also for application thereon of payments upon an account in favor of the Kraft Cheese Co. against certain of the livestock on said ranch.

4.

Concurrently with the execution of this purchase agreement a supplement was added to the listing or broker's contract between the plaintiff and defendants providing that the \$6,000 real estate commission should be paid \$2,000 when the first \$25,000 was paid upon the purchase price of said property, \$2,000 when the second \$25,000 was paid upon said purchase price and the remaining \$2,000 when the balance of said \$70,000 installment upon said purchase price should be paid.

5.

That shortly after the execution and delivery of said agreement between the defendants and Randall Bros., the Randall Bros. entered into possession of said Cove ranch and personal property sold therewith, farmed said ranch and cared for said personal property; that Randall Bros. made substantial pay-

ments on the purchase price, the exact amount of such payments being in dispute, it appearing from the evidence that the total of the payments and the credits on said agreement amounted to well in excess of \$25,000; that Randall Bros. plowed or disced some two hundred acres, made certain improvements on the dwelling houses, paid taxes and water assessments, and proceeded with the operation of said ranch and property themselves or by their authorized agents.

6.

That Edward Randall and Oriel Randall executed and delivered notes and mortgages on their home ranches as provided for by the agreement of May 12, 1948, which mortgages are still in effect; that Carl H. Randall not having executed and delivered note and mortgage on his ranch, the defendants and Randall Bros., on the date of August 12, 1948, entered into a modified agreement providing for certain other securities in lieu of the mortgage not given by Carl H. Randall; that a copy of such modified agreement appears as a part of paragraph four of the amended complaint, under the terms of which it was agreed that certain livestock should be sold and proceeds applied on the purchase price of said ranch and property, which sale proceeds should stand in lieu of the mortgage security which Carl H. Randall had not furnished on his home lands, and such modified agreement further provided that the agreement of May 12, 1948, "as herein modified shall be deemed to be in full force and effect."

7.

That on the date of April 4, 1949, at a time when said purchasers (the Randall Bros.) were not in default on the contract of purchase in any respect, the defendants and the Randall Bros. entered into an agreement copy of which appears in paragraph seven of the amended complaint, whereby it was agreed that the Randall Bros. should execute and deliver to the defendants a quitclaim deed for said ranch and personal property, and turn over immediate possession of all said property to the defendants, and it was further agreed thereby that upon payment of the sum of \$6,000 to the defendants by the Randall Bros., the defendants would cancel and discharge the notes and mortgages of Edward Randall and Oriel Randall and the note of Carl H. Randall, each of said notes being in the principal sum of \$25,000; and that upon the execution and delivery of said agreement the Randall Bros. relinquished possession and control of said ranch and personal property, and it was mutually agreed between the defendants and the Randall Bros. that said agreement of purchase should be mutually cancelled and terminated.

8.

That the mutual rescission of the agreement of April 4, 1949, was entered into between defendants and Randall Bros. without the knowledge, consent, or approval of the plaintiff.

9.

That by entering into said mutual release and

cealment, or misrepresentation in all said dealings with the defendants.

10.

That by entering into said mutual release and rescission with Randall Bros. the defendants have abandoned said agreement for the sale of said ranch and property under the terms of the contract of May 12, 1948, and the modification of such agreement had under date of August 12, 1948, and have thereby relieved Randall Bros. (Edward Randall, Oriel Randall and Carl H. Randall) of the necessity and obligation of making further payments of the installments upon the purchase price of said Cove ranch and personal property so sold to Randall Bros., and have thereby, without plaintiff's knowledge, consent or approval, terminated the chain of events designed by the pertinent contracts to mature and make payable the installments of plaintiff's real estate commission.

11.

That no payment has been made upon the plaintiff's real estate commission by the defendants, or either thereof, and there is now due and owing from the defendants to the plaintiff on account thereof the sum of \$6,000, with interest at 6% per annum from the date of the judgment in this case.

Conclusions of Law

1.

The plaintiff, J. Harold Abegglen, was the procuring cause in effecting the sale of the Cove ranch, with livestock, machinery, etc., by the defendants to Edward Randall, Oriel Randall, and Carl H. Randall.

2.

The execution and delivery of the agreement for the sale of the ranch, livestock, machinery, etc., by the defendants to the Randalls, May 12, 1948, and the modified agreement between the same parties, August 12, 1948, constituted conclusive proof that the defendants were satisfied with the qualifications of the Randalls as purchasers and of their ability to perform the contracts.

3.

The plaintiff was not guilty of misconduct toward his principals, the defendants, nor did he conceal material facts from his said principals, nor did he make misrepresentations to his said principals, in effecting the sale of said property to the Randalls.

4.

By the execution and delivery of the modified agreement of August 12, 1948, the defendants acquiesced in the substitution of securities for the mortgage which Carl H. Randall had not given, and the defendants thereby waived any right that they may theretofore have had to rescind the original contract of sale of May 12, 1948, on account of any

claimed misconduct, concealment, or misrepresentation of the plaintiff in effecting the sale of said property for the defendants.

5.

After being fully advised that Carl H. Randall did not have a deed for his ranch, and after said Randall did not give a mortgage as required in the original agreement of May 12, 1948, the defendants by entering into the modified agreement of August 12, 1948, and also by entering into new arrangements and engagements concerning the subject matter of the contract are deemed to have and have waived the right to successfully assert any misconduct, misrepresentation or concealment on the part of the broker in bringing about the sale of said property.

6.

By making the agreement of April 4, 1949, delivering possession of the Cove ranch and remaining personal property to the defendants and relieving the Randalls of the obligation to pay the balance of the contract purchase price upon said ranch, without the knowledge, consent or approval of the plaintiff, and at a time when the Randalls were not in default on the contract of purchase in any respect, a mutual compromise and rescission was effected, the defendants abandoned the sale of said property, the making of further payments upon the purchase price was obviated, and plaintiff's full commission was forthwith matured and became payable.

7.

That the plaintiff is entitled to judgment against defendants for the sum of \$6,000, with interest at 6% per annum from the date of judgment.

Dated at Boise, Idaho, June 27th, 1950.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed July 3, 1950.

In the District Court of the United States in and
for the District of Idaho, Southern Division

No. 2674S

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and
L. EARL BURNHAM,

Defendants.

JUDGMENT

This cause came on regularly for hearing before the court sitting without a jury at Boise, Idaho, February 8, 1950, plaintiff appearing in person and by his attorneys, E. B. Taylor and Bissell & Bird, and the defendants appearing in person and by their attorneys, J. D. Skeen and Oscar W. Worthwine; and the court having heard and considered oral and documentary evidence, and having considered

written briefs, and having heard and considered oral arguments, and having made findings of fact and conclusions of law, and being fully advised on the premises;

It is hereby ordered, adjudged and decreed that the plaintiff, J. Harold Abegglen, have and recover judgment against the defendants, Perry E. Burnham and Earl Burnham, and each of them, for the sum of \$6,000, with interest thereon at the rate of 6% per annum from the date hereof, and for costs of suit taxes at \$151.70.

Dated at Boise, Idaho, June 27th, 1950.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed July 3, 1950.

CLERK'S CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing documents and pleadings, together with the Judgment (entered in Civil Order Book No..... at page.....), constitute the Judgment Roll in this cause, under the rules of this Court.

Witness my hand the seal of said Court this 3rd day of July, 1950.

ED. M. BRYAN,
Clerk.

[Title of District Court and Cause.]

NOTICE TO APPEAL

To the Above Named Plaintiff and to Bissell and Bird and to E. B. Taylor, His Attorneys, and to the Clerk of the Above-Entitled Court:

You and each of you will take notice that the defendants, Perry E. Burnham and L. Earl Burnham, hereby appeal from the Judgment made and given in the above-entitled court in favor of the above named plaintiff and against the above named defendants on the 3rd day of July 1950, to the United States Court of Appeals for the Ninth Circuit.

This appeal is taken from the whole of the said Judgment and on questions of law and fact.

Dated this 27th day of July, 1950.

/s/ J. D. SKEEN,

/s/ PERRY E. BURNHAM,

Attorneys for Appellants, Perry E. Burnham and L. Earl Burnham.

[Endorsed]: Filed July 27, 1950.

In the United States District Court, for the District
of Idaho, Southern Division.

No. 2674

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and

L. EARL BURNHAM,

Defendants.

Appearances

E. B. TAYLOR, ESQ.,

Hailey, Idaho

BRANCH BIRD, ESQ.,

Gooding, Idaho

W. G. BISSELL, ESQ.,

Gooding, Idaho,

Attorneys for the Plaintiff.

J. D. SKEEN, ESQ.,

Salt Lake City, Utah

OSCAR W. WORTHWINE, ESQ.,

Boise, Idaho,

Attorneys for the Defendants.

TRANSCRIPT

This matter came on for hearing before the Honorable Chase A. Clark, U. S. District Judge, sitting without a jury, at Boise, Idaho, on February 8, 1950.

February 8, 1950, 2:00 o'clock p.m.

Statement of the case made by Mr. Bird, Reported, but not transcribed.)

J. HAROLD ABEGGLEN

called as a witness by the Plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Bird:

Q. Will you state your name?

A. J. Harold Abegglen.

Q. Where do you reside?

A. Hailey, Idaho.

Q. You are the Plaintiff in this case?

A. Yes, sir.

Q. What business are you in?

A. The real estate business.

Q. How long have you been in that business?

A. Since 1947.

Q. Were you in the real estate business in Blaine County in 1948? A. Yes, sir.

Q. Were you licensed as a real estate broker under the Idaho laws. A. Yes, sir. [1*]

Q. And did you have a license for that year?

A. Yes, sir.

Q. Handing you paper which is marked Exhibit 1, will you state what that is?

A. It is a certificate of real estate broker issued by the State of Idaho.

(Testimony of J. Harold Abegglen.)

Q. For what year? A. 1948.

Mr. Bird: I offer this in evidence at this time.

Mr. Worthwine: No objection.

The Court: It may be admitted.

Q. Mr. Abegglen, are you acquainted with the
Misters Burnham, the Defendants in this action?

A. Yes, sir.

Q. When did you first become acquainted with
them?

A. When they came to my office at Hailey in the
fore part of April, 1948.

Q. And what was their business at that time?

A. They came to my office one morning and
asked me a question pertaining to the Cove Ranch;
if I had a listing on the ranch and if I had a pur-
chaser; I replied "Yes, I did," and they asked who
I had listed with, and I said Mr. Leighton, and
they said that Mr. Leighton didn't own the Cove
Ranch; that they owned it and they said: "You [2]
will have to deal with us if you have a purchaser."

Q. And that is the Cove Ranch described in these
pleadings? A. Yes, sir.

Q. Who was Mr. Leighton and what was his
connection with this?

A. Mr. Leighton was supposedly the owner of
the Cove Ranch; he listed the ranch with me for
sale in April; I took the listing and began working
on it. I took several parties over the ranch and
explained the possibilities of it; being a resident
of Blaine County for fourteen years I knew the
ranch as well as Leighton did.

(Testimony of J. Harold Abegglen.)

Q. Was Mr. Leighton occupying the ranch at that time? A. Yes, sir.

Q. What further dealings with the Burnhams did you have?

A. After that meeting they asked the names of the prospective purchasers; who they were and what they had. They suggested we have a meeting with the Burnhams sometime that month in Twin Falls, which was done.

Q. Do you have a listing with, or did you have with the Burnhams? A. I do.

Q. Do you have that with you?

A. No, it was put in the deposition taken in Salt Lake City, Utah, in October, I believe.

Mr. Bird: We agreed that we may withdraw these exhibits. [3]

The Court: They may be withdrawn if it is agreeable with counsel.

Mr. Bird: Very well.

Q. Mr. Abegglen, calling your attention to the deposition contained in the deposition, which paper is now marked Exhibit No. 2 for identification, are you familiar with it? A. Yes, sir.

Q. What is it?

A. My listing that Burnhams signed in person.

Q. Is that the listing you just had reference to?

A. That's right.

Mr. Bird: We offer this in evidence.

Mr. Worthwine: No objection.

The Court: It may be admitted.

(Testimony of J. Harold Abegglen.)

Q. Mr. Abegglen, calling your attention to the date on this exhibit just introduced, it is your recollection that it was signed as of that date?

A. April 29th.

Q. 1948? A. That's right.

Q. Calling your attention to the memoranda on the back of that which bears a different date, what is the explanation of that? [4]

A. The deal was closed and then a contract of sale was drawn up between the Randalls and the Burnhams, and then the question arose as to the method of payment of the commission; I agreed to take it as the installment were paid, and this addendum was put on the back of that.

Q. On the date it bears? A. Yes, sir.

Q. What other steps did you take in connection with this matter?

A. As I said before, I had several prospective buyers for the ranch; I went over the ranch with Mr. Leighton; when the Randalls became interested I corresponded with the brothers and visited their places in Eden, Parma, and New Plymouth, and became acquainted with the brothers. Then this meeting in April was held in the home of one of the brothers, R. B. Randall of Twin Falls. The two Burnham brothers, Mr. Skeen, attorney, and the Randall brothers, the question was discussed pro and con of how the ranch could be purchased, terms, etc. The meeting was adjourned in mid-afternoon and the Burnham brothers retired to their hotel and negotiations were carried on from there until eve-

(Testimony of J. Harold Abegglen.)

ning. I made several trips over to the Burnham brothers, at the Rogerson Hotel, trying to get the parties together. [5]

Q. What was the outcome of this?

A. One of the items discussed was the interest rate, the Randalls didn't want to pay more than 4% and the Burnhams wanted five or six, and finally agreed that if I would take a reduction on my commission they could agree,—I finally agreed to reduce it from five per cent to a flat \$6,000, and they agreed to pay 4% interest, and the parties got together that evening and Mr. Skeen dictated an agreement and I typed it. It was getting very late and we agreed to make a trip to the ranches in person and to come to Boise to make the final arrangements and agreement.

Q. Was anyone else present at this conversation other than these gentlemen you have mentioned?

A. Not that I know of.

Q. The Randall brothers are the three named in this contract, they were all there?

A. At the Boise meeting?

Q. At Twin Falls?

A. All there but Edward.

Q. Handing you the paper which has been marked as Exhibit No. 3, are you familiar with that?

A. Yes, sir, I am.

Q. What is that? [6]

A. That is the final agreement between the parties concerned.

(Testimony of J. Harold Abegglen.)

Q. Is this the agreement you spoke of that was dictated by Mr. Skeen and typed by you at the meeting in Twin Falls?

A. This was not typed by me. I typed a tentative agreement; this one was made up by Mr. Skeen.

Q. Do you know the signatures on that?

A. Yes, sir.

Q. Whose are they?

A. The two Burnham brothers and the three Randell brothers.

Q. Was Mr. Leighton present at this conversation at Twin Falls?

A. No, sir, he wasn't present at that meeting.

Mr. Bird: We offer this Exhibit No. 3 in evidence at this time.

Mr. Worthwine: No objection.

The Court: It may be admitted.

Q. Calling your attention to what is something of a postscript to that, in longhand, were you present when it was put on?

A. I don't think I was present at that time.

Q. Do you know whose handwriting that was?

A. Perry E. Burnham and the Randell brothers.

Q. This postscript I am talking about?

A. It looks like the handwriting of Perry [7] Burnham.

Q. Do you know whether the Randell brothers went into possession of the ranch after this contract was executed? A. Shortly thereafter.

Q. And did they farm it during the farming season of 1948? A. They did.

(Testimony of J. Harold Abegglen.)

Q. What was the next thing that came to your attention about this transaction?

A. I received a letter from Perry Burnham in the fore part of June asking me——

Mr. Worthwine: The letter would be the best evidence.

Q. Do you have the letter? A. I do.

Q. I hand you now, Mr. Abegglen, paper which has been marked Exhibit No. 4, is that the letter you had reference to? A. Yes, sir.

Q. In substance what did he request in that letter?

Mr. Worthwine: The letter would be the best evidence.

Mr. Bird: I beg your pardon,—I offer this in evidence at this time.

Mr. Worthwine: No objections.

The Court: It may be admitted. [8]

Q. I would like to ask the witness what is the substance of that letter?

A. It was requesting that I check the inventory when the Randell brothers moved on the Cove Ranch.

Q. Was that done?

A. I was there and helped every way I could in person.

Q. Is that the inventory that is attached to the contract that has been admitted in evidence?

A. I think the contract has *been* admitted, and I think the inventory has been admitted also.

(Testimony of J. Harold Abegglen.)

Q. Was this inventory a part of this deal that went with the ranch?

A. They had included all the personal property, livestock and machinery.

Q. What was the extent of that?

A. Farming machinery and livestock.

Q. How much livestock?

A. Supposedly 100 head of dairy cattle.

Q. What ages? A. All ages.

Q. Did the Randells take possession of the property and did they proceed with the farming of it?

A. Yes, sir.

Q. Were you there and know what improvements or equipment they put on the place? [9]

A. I visited them often.

Q. What equipment did they bring on the place in addition to what was there?

A. Mr. Carl Randell brought on several pieces of equipment to farm the ranch as it should be farmed; he brought a caterpillar, a hay chopper, and several other items.

Q. What size caterpillar was that?

A. I cannot say.

Q. What did it cost?

A. Several thousand dollars.

Q. And what did the hay chopper cost?

A. Several thousand dollars too.

Q. Did they proceed with the farming that season? A. They did.

Q. What was the next thing you heard from that transaction concerning the purchase of this place?

(Testimony of J. Harold Abegglen.)

A. After they took possession?

Q. Yes.

A. All I know is there was another amended agreement drawn between the Randells and the Burnhams, which I was not a party to.

Q. A moment ago you stated that Mr. Leighton was not present at this conference in Twin Falls, was he present later, when the ranches were inspected?

A. He was present before that, when the Burnhams requested me to come to Eden,—that was in the first of May, 1948, [10] to meet them and visit the ranch, accompanying was Mr. Jack Leighton, who was their agent. We drove to Eden and met the Burnhams, the Burnham brothers and continued on to the ranch of Oreal Randell. The Burnhams went on to Boise and left instructions to bring Leighton and Randell to the Boise Hotel and meet them there; to call Carl and Ed Randell to be present that evening; we met them at the Boise Hotel that evening and the agreement was gone over in some detail; they adjourned that evening and the next morning they went to the respective ranches; to Parma and New Plymouth.

Q. When was this contract made in May of 1948 with respect to the inspection of the ranches?

A. That was previous to the signing.

Q. You inspected the ranches when?

A. May the 12th.

Q. Did you come back to the Boise Hotel?

A. Yes, sir.

(Testimony of J. Harold Abegglen.)

Q. And was it at that time the contract was signed?

A. That is right. Mr. Leighton and I could not get accommodations in Boise and we had to go to Nampa, and we met them the next morning and went to Parma.

Q. Who was present at the conferences on May 11th and the 12th?

A. The two Burnham brothers, the three Randells and myself,—[11] Jack Leighton and Mr. Burnham's son was also there.

Q. Was Mr. Skeen also there?

A. Yes, sir, Attorney Skeen.

Q. Do you know who he was representing?

A. The Burnhams.

Q. Did the Randells have a representative, a legal representative there? A. No.

Q. Did they have at any conference?

A. No, they relied on the integrity of Mr. Skeen.

Q. Did you assist the Randells the following year in doing some of the business of the ranch?

A. I handled practically all of the business, I paid the taxes, the water assessments, and all the other bills like that.

Q. The tax receipts, could you produce them?

A. Well, here are the irrigation district receipts, the Wood River Valley Irrigation District.

Q. Handing you a paper with two items attached by a paper clip, being marked Exhibit No. 5, will you tell us what that is?

(Testimony of J. Harold Abegglen.)

A. That is the Water Master's assessment receipt for 1948 and also the assessment of \$51.23 on that many shares of By-Pass water. [12]

Q. And here is another item?

A. The Wood River Valley irrigation assessment, it all amounts to some \$1700.00.

Q. Were these matters pertaining to the Cove Ranch, were they charges for that year?

A. That's right.

Q. Were you able to find the original tax receipts, Mr. Abegglen?

A. No, just on the water.

Mr. Bird: We offer this in evidence at this time.

Mr. Worthwine: We have no objection.

Mr. Bird: We are stapling the two other items mentioned, a total of four items, to the sheet.

The Court: Very well, they may be admitted.

Q. Mr. Abegglen, were these payments made by you on behalf of the Randell brothers?

A. Yes, sir, the Randell brothers reimbursed me for making these payments.

Q. They are the correct amounts?

A. Yes, sir.

Q. Were the taxes paid for that year?

A. Yes, sir, the taxes were paid by myself, but the receipt [13] was given to Mr. Oreal Randell, I think he has the receipt.

Q. Was any improvements done on the property, were there any improvements made in the way of water works or buildings on the ranch?

(Testimony of J. Harold Abegglen.)

A. Carl did a considerable amount of improvement on the dwelling; finishing two rooms in the house and repairing the roof, redecorating the house and putting water in the house.

Q. What about the kitchen, headgate and weir?

A. There was a weir paid for by myself, \$485.00 which was given to me by Jack Leighton.

Q. Do you know whose money that was?

A. Mr. Jack Leighton gave me the money to make the payment with.

Q. You don't know whether,—or where it came from?

A. No, sir.

Q. Who installed the weir?

A. Perhaps Cliff Leighton, I don't recall.

Q. Handing you a paper which has been marked as Plaintiff's Exhibit No. 6, are you familiar with that?

A. I am.

Q. What is that?

A. That is a modified agreement made on August 12, 1948. [14]

Q. Pertaining to this same transaction?

A. The same transaction.

Mr. Bird: I might explain that these three copies were necessary to make up one complete contract; some parties signed only one, and some parties signed another copy, so the three make up the complete contract.

Mr. Worthwine: We have no objection if the exhibit is offered.

Mr. Bird: I will offer it at this time.

The Court: Then it may be admitted.

(Testimony of J. Harold Abegglen.)

Q. This signature on the contract of August 12, 1948, are the signatures of Burnhams and Randells?

A. On this particular one, I think there is only one signature, and this was acknowledged before me, the signature of Oreal Randell, he has his agreement witnessed.

Q. And these others, Edward and Carl Randell?

A. That's right, Edward and Carl, and I believe I said the first was Oreal Randell, that is an error, I meant to say Carl Randell on this first page.

Q. Do you know where this contract was executed? A. Where it was signed?

Q. Yes.

A. At separate places, the three separate agreements at separate places, each bearing the signature of one of the [15] Randells, I surmise it was made in Salt Lake City.

Q. Were you present at any time other than the acknowledgment you refer to?

A. That is the first I knew about it.

Q. Did you take any part in the pre-contract meetings that led to the execution of this contract?

A. No, sir.

Q. What was the next important item in this chain of events, in regard to this ranch, that you participated in?

A. When I was invited to attend a meeting at Twin Falls; invited by Oreal Randell and Carl Randell, not on behalf of Burnhams but the Randells, to sit in on this agreement in April, 1949.

Q. Who was present at that meeting?

(Testimony of J. Harold Abegglen.)

A. The three Randells, the two Burnham brothers, Attorney Skeen and their son, that is, Perry Burnham's son, and myself.

Q. Was there any other person there at the proceedings? A. Not that I recall.

Q. Was Mr. McFadden there?

A. I didn't see him.

Q. Was Mr. Baldwin there?

A. I didn't see him.

Q. What was done at this conference? [16]

A. The purpose of this meeting as I understood it was to revamp the whole situation. The Burnhams required a down payment in earnest money or cash, they requested or required \$10,000.00 in cash to continue under the agreement previously in force.

Q. Was that \$10,000.00 paid?

A. Not that I recall.

Q. A few weeks preceding that had the Burnhams made any request or demand upon the Randells for refinancing or getting a loan to pay this cash?

A. As I understand it they made a request.

Mr. Worthwine: Were you present?

A. That was made known to me by the Randells.

Mr. Worthwine: We move to strike that as hearsay.

The Court: It may be stricken.

Q. I hand you a paper that has been marked as Plaintiff's Exhibit No. 7, are you familiar with that?

A. Yes, sir, I am.

Q. What is that?

(Testimony of J. Harold Abegglen.)

A. That is the agreement made between the Randells and the Burnhams on April 4, 1949.

Q. Pertaining to the same Cove Ranch?

A. That's right, the same Cove Ranch. [17]

Mr. Worthwine: We have no objection.

The Court: Was that offered, Mr. Bird?

Mr. Bird: I intended to offer it.

The Court: It may be admitted.

Q. Mr. Abegglen, were you present when this was signed? A. I was not.

Q. When was that drawn up?

A. I don't know.

Q. Were you present at that time?

A. I was not.

Q. Do you know the signatures on that instrument? A. Yes, sir.

Q. And they are whose signatures?

A. The Randell and Burnham brothers' signatures.

Mr. Bird: We offer at this time a paper which has been marked as Plaintiff's Exhibit 8, being a certified copy of a quitclaim deed from Randell Brothers to Burnham Brothers.

Mr. Worthwine: We have no objection.

The Court: It may be admitted.

Q. Did you have any conversation with Mr. Skeen at this conference of April 4, 1949, about any motive for this move or termination of this transaction?

A. Yes, sir, Attorney Skeen made the remark to me and also Randell, at Twin Falls, that if they

(Testimony of J. Harold Abegglen.)

couldn't come to [18] an agreement at that meeting that the Burnhams had a cash buyer for the ranch.

Q. Mr. Abegglen, I believe you stated that you are thoroughly familiar with the Cove Ranch?

A. Yes, sir.

Q. You have been in the real estate business for how long? A. 1947.

Q. Have you had an occasion to buy and trade in ranch property and to act as agent in such transactions on similar property in that vicinity?

A. Yes, sir.

Q. And what, in your opinion, was the reasonable value of the Cove Ranch in April, 1949, in the condition in which it was returned from the Randells to the Burnhams?

Mr. Worthwine: We don't see the materiality of that and we object to it.

The Court: I think he may answer.

A. I would say \$100,000.00, approximately.

Q. It had been sold to the Randells for what price? A. \$140,000.00.

Q. And between these periods had there been some changes in the values of the property?

A. A change in the livestock, the livestock had been sold, leaving the real estate and equipment.

Q. At the time this ranch was sold according to the contract in evidence some of the property was sub-let to a gentleman named,—

A. —Stelma.

Q. And were you familiar with that feature?

(Testimony of J. Harold Abegglen.)

A. I knew that he had a lease on part of the ranch.

Q. And under the transaction the landlord's share of the crops that he produced went to the purchasers? A. That is correct.

Q. Did you visit those three Randell ranches during the negotiations?

A. I made several trips. I made a special trip to visit the three of them, at Eden, Parma and New Plymouth.

Q. Were you there more than once?

A. Twice at Parma and more than once at Eden and New Plymouth.

Q. What is the size of the ranch at Eden, that is, Oreal Randell's Ranch?

A. I think it is over 200 acres.

Q. What in your opinion was the value of that ranch at that time? A. At least \$37,000.00.

Q. What was the size of the Carl Randell ranch?

A. 70 acres of highly cultivated land.

Q. Was it irrigated? A. Irrigated. [20]

Q. Was the Oreal Randell ranch irrigated?

A. Yes, sir.

Q. And what would be the value of the Carl Randell ranch at the time, in your opinion?

A. He valued his property at that time at \$40,000.00.

Q. And would that be a fair and reasonable value?

A. That was very high priced land,—very productive.

(Testimony of J. Harold Abegglen.)

Q. In what district was that?

A. That was in the New Plymouth district.

Q. And what was the size of Ed Randell's ranch?

A. 160 acres, I think.

Q. And was it irrigated? A. Yes, sir.

Q. And what district was that in?

A. Parma.

Q. And what was the value of that?

A. \$30,000.00.

Q. Had you made any demand upon the defendants for the payment of your commission?

A. Yes, sir.

Q. And have they paid it? A. No, sir.

Q. Any part of it? A. No part of it.

Mr. Bird: That is all, you may inquire. [21]

Cross-Examination

By Mr. Worthwine:

Q. You visited the Cove Ranch frequently from the time the Randells took possession until April of 1949? A. Yes, sir.

Q. How many times between November 1, 1948, and April, 1949?

A. In the winter time I had no occasion to visit it.

Q. When was the last time you visited it?

A. The exact date I cannot say,—I visited them frequently all summer and fall, during the harvest time.

Q. You don't recall that you visited it at all from the fall until the following April?

(Testimony of J. Harold Abegglen.)

A. I passed by the place several times and I visited once in the snow.

The Court: We will recess at this time for fifteen minutes.

February 8, 1950. 3:10 P.M.

Q. During the summer and fall of 1948 when you visited the ranch who was in charge of that ranch? A. Carl Randell.

Q. Were any of the other Randells there?

A. On occasion.

Q. Any of them live there other than Carl Randell? A. They did not.

Q. Did you visit the Cove Ranch after April of 1949? A. Yes, sir. [22]

Q. Was there any of the Randell equipment there at that time?

A. There was equipment there, I think it was Randells.

Q. The equipment that the Randells had moved there?

A. The equipment that had belonged to the Burnhams.

Q. Did you testify to the effect that the Randells had bought a hay chopper? A. Yes, sir.

Q. And a tractor?

A. A Crawler,—a caterpillar.

Q. What equipment was on the ranch when they went into possession in May of 1948?

A. That is in the inventory, I cannot name it exactly.

(Testimony of J. Harold Abegglen.)

Q. I will ask you if Defendants' Exhibit No. 9 is the inventory that you think you supervised the taking of? A. Yes, sir.

Q. Do you know on whose typewriter that was typed? A. No, sir, I don't.

Q. Do you think it was your own?

A. It could have been.

Q. Do you recall whether or not this property had been listed about a month before the Randells took possession? A. Did I know it was listed?

Q. In the inventory, I mean,—

A. —Will you repeat that, please? [23]

Q. Was the list of the property,—let me put it this way, do you know when the typing on the first page and part of the second page in blue carbon was done?

A. Sometime previous to June the 3rd, if it was done by me.

Q. And this was the property that was on the ranch before the Randells moved any property to it?

A. That is correct.

Q. You testified there were about 100 dairy cattle? A. Yes, sir.

Q. How many tractors?

A. Two, if I remember.

Q. Two tractors? A. Yes, sir.

Q. Of what value were those tractors?

A. I cannot say, I never appraised them.

Q. Did you appraise the tractor and the hay chopper that were brought there by the Randells?

(Testimony of J. Harold Abegglen.)

A. Yes, I priced it on the market.

Q. When did you do that?

A. After the purchase was made by Randell.

Q. And you found the hay chopper value to be what?

A. I understand it ran to thousands of dollars.

Q. Can you give it any closer?

A. I cannot give any correct amount on either of them.

Q. What was the value of all the property that was listed in the inventory, Exhibit No. 9?

A. As I understand it the real estate was worth around [24] \$100,000.00 and equipment and livestock \$40,000.00,—that was my understanding.

Q. You have been familiar with the ranch for years? A. Yes, sir.

Q. How much was the annual operating expenses of the Cove Ranch? A. I cannot say that.

Q. Do you have any idea? A. No, sir.

Q. You testified that the value of the ranch at Eden was \$37,000.00; as I recall you put that valuation on it in April, 1949, is that right?

A. Not 1949, that was 1948.

Q. How many times did you visit the ranch at Eden?

A. Half dozen times before the sale was consummated.

Q. When was the first time you visited it?

A. Sometime early in April.

Q. Was that before you met the Burnhams?

(Testimony of J. Harold Abegglen.)

A. Yes, sir.

Q. Did you look into the title of that?

A. No, sir.

Q. Do you know anything about the title of the ranch at Eden? A. I assumed it was clear.

Q. How many times did you visit the Carl Randell ranch at New Plymouth?

A. Three times, I believe it was. [25]

Q. When was the first time?

A. The first time was the first part of May.

Q. Were you visiting it then on behalf of the Burnhams?

A. On behalf of the transaction, yes, sir, to become acquainted with the ranch and find its location.

Q. Did you become acquainted with it?

A. Yes, sir, I went over the ranch.

Q. The testimony was that at that time it was worth \$40,000.00?

A. That was the appraised valuation that Mr. Randell gave.

Q. Did it look to you to be worth that amount?

A. It looked pretty good to me.

Q. Did you know whether Mr. Randell had title to that? A. I was advised that he did not.

Q. Were you advised who did have title?

A. No, sir, I knew that he was buying it on a contract.

Q. Did you know from whom he was buying it?

A. No, sir.

(Testimony of J. Harold Abegglen.)

Q. Ed Randell, at Parma, that place I believe you said was worth \$30,000.00? A. Yes, sir.

Q. Was there any encumbrances on that ranch?

A. Yes, sir.

Q. And what was the amount?

A. Approximately \$4,000.00, — a Reclamation lien. [26]

Q. Did you,—strike that, please,—but you did know at that time that Carl Randell didn't have title to the ranch at New Plymouth?

A. I did know that.

Q. Did you that so far as the ranch at Eden was concerned that Oreal Randell didn't have title in his name? A. I did not.

Q. In regard to the commission agreement, Plaintiff's Exhibit No. 2, when was the—did the Burnhams sign that more than once?

A. They put signatures on there twice.

Q. When was the first time?

A. April 29th.

Q. Where? A. At Twin Falls.

Q. Who was present?

A. Earl Burnham and Perry Burnham.

Q. In typing "May 1, 1948," upon that,—that has been stricken out?

A. I think it was just a misprint on the type-writer, they were to write the date in.

Q. Did you take this instrument to Twin Falls?

A. Yes, sir.

Q. And there has been typed in this instrument

(Testimony of J. Harold Abegglen.)

the words [27] "Less \$1,000.00,"—when was that typed in?

A. When I agreed to reduce my commission.

Q. And when was that?

A. In 1948 at Twin Falls.

Q. And on a part of the other side of that instrument, when was that written?

A. At the consummation of this agreement at the Boise Hotel.

Q. And who was present?

A. The Randells, the Burnhams, Attorney Skeen and Jack Leighton.

Q. Who typed it? A. I did.

Q. Where did you get the typewriter?

A. At the lobby.

Q. That is dated May 15th? A. Yes, sir.

Q. Is that the date it was signed?

A. There is a question of that date, whether it was May the 12th or the 15th, the date on the contract.

Q. Do you know which is correct?

A. I cannot tell exactly.

Q. The deal as consummated called for three mortgages—consummated in May, whether it was the 12th or 15th, in the Boise Hotel,—it provided for three mortgages as security for the payment of \$70,000.00? A. That is correct. [28]

Q. The mortgages were to be executed by the three Randell brothers, Oreal, Carl and Edward?

A. That is right.

(Testimony of J. Harold Abegglen.)

Q. The property to be mortgage was the \$40,000.00 ranch at New Plymouth?

A. That is correct.

Q. And the other property at Parma?

A. That's right.

Q. That was the \$30,000.00 property?

A. Yes, sir.

Q. And the \$37,000.00 property at Eden?

A. That's right.

Q. Do you know whether those mortgages were executed? A. Two were.

Q. And which one was not? A. Carl's.

Q. Do you know why? A. No, sir.

Q. There was nothing paid down on this deal?

A. Not in earnest money.

Q. Had you ever seen or met Mr. Earl or Perry Burnham before this day, I believe it was April 29th, when they came to your office?

A. I didn't say it was the 29th, it was sometime in April.

Q. What time in April was it? [29]

A. I cannot say.

Q. What time of day was it?

A. It was in the morning.

Q. And who was with them?

A. The two brothers, the Burnham brothers.

Q. Was there anyone else?

A. Not that I recall.

Q. Who was present when they called?

A. Myself.

Q. And where did you see them again?

(Testimony of J. Harold Abegglen.)

A. At Eden.

Q. At Eden?

A. No, it was at Twin Falls, excuse me.

Q. That was when the first part of Exhibit No. 2 was executed?

A. That was when the agreement was typed.

Q. Where did you see them?

A. At the home of R. B. Randell.

Q. Is that another brother? A. Yes, sir.

Q. Who was present?

A. Mike Randell, Carl Randell, R. B. Randell, Jack Leighton and Mr. Skeen.

Q. Was Mr. Skeen present at that time?

A. Yes, sir. [30]

Q. Mike is the same as Oreal Randell?

A. That is right.

Q. Mr. Skeen was there? A. Yes, sir.

Q. He dictated that contract and you took it and type wrote it? A. Yes.

Q. Where was that typed?

A. At the home of R. B. Randell.

Q. That contract was never signed?

A. Not that I know of.

Q. Did you meet Mr. Perry Burnham and Earl Burnham, Mr. Skeen and Jack Leighton in Eden in April, 1948?

A. With Jack Leighton I met the two Burnham brothers and their son Robert at Eden.

Q. Where did you meet them?

A. About the center of town near the postoffice.

(Testimony of J. Harold Abegglen.)

Q. And what discussion took place there between you and the persons that you met there?

A. Just that we consented to take them over to the ranch and they followed us to the Oreal Randell ranch.

Q. At that time, at the postoffice, was the question of the title to the property brought up?

A. Not that I recall.

Q. Now, I will ask you if at that time Mr. Perry Burnham, in the presence of Mr. Skeen and in the presence of Carl [31] Burnham and Jack Leighton and Robert Burnham, asked you if Randell had a clear title to that property,—if they all had clear titles to their property?

A. Who is Carl Burnham?

Q. I meant Earl Burnham, pardon me.

A. I recall no such conversation.

Q. I will ask you if Perry Burnham asked if the Randells had clear title to their property in the presence of those persons you said were there, and if you said in the presence of those same persons, “they have good, clear title in the value of \$75,000.00 to \$90,000.00”? A. I made no such statement.

Q. After meeting these gentlemen at the post-office where did you go?

A. We went to the ranch at Eden.

Q. And where did *you* from there?

A. They examined the ranch and were satisfied and left for Boise.

Q. How did you travel to Boise?

(Testimony of J. Harold Abegglen.)

A. They left in their car and I took Leighton and Randell with me in my car.

Q. When was that? A. That was in May.

Q. With reference to the date of the contract of the sale at the Boise Hotel, when was it? [32]

A. The day before.

Q. Did you secure a room at the hotel in Boise that night? A. No, we couldn't get a room.

Q. Did you have a meeting at Boise?

A. Yes, sir.

Q. Who was present?

A. Earl Burnham, Perry Burnham, and their son, Bob, Mr. Skeen and myself.

Q. Mr. Skeen was acting for the Burnham brothers? A. Yes, sir.

Q. As their attorney? A. Yes, sir.

Q. Did Mr. Skeen ask about the titles to the property owned by the Randells?

A. Not that I recall.

Q. He didn't ask about the title?

A. Not at that time.

Q. I will ask you if it is not a fact at that time, in the Boise Hotel, in the presence of the parties you testified to,—were the three Randell brothers present? A. That evening.

Q. Previous to the signing of the agreement?

A. Yes, they were. [33]

Q. In the presence of the three Burnhams, Perry Burnham, Earl Burnham and Robert Burnham, Mr. Skeen, and the Randell brothers, Mr. Skeen asked

(Testimony of J. Harold Abegglen.)

you if the Randells had clear title to these three ranches, and you replied that they did except the ranch at Parma, and that that ranch had a mortgage on it of about \$4,000.00?

A. That was my understanding.

Q. Did you tell them?

A. Yes, I told the Burnhams.

Q. Did you tell them the Randells had title to the other property?

A. I told them the ranches were clear except the lien they referred to and Carl didn't own his ranch, that he was buying it on a contract.

Q. Who asked the question?

A. I cannot recall.

Q. You advised the Burnhams that Carl was buying his ranch on a contract?

A. That's right.

Q. How many times did you advise them?

A. If they asked more than once I told them the same thing.

Q. Isn't it a fact that at this meeting at the Boise Hotel, the question had been asked by Mr. Skeen and your reply was that they had clear title except for Edward's ranch at Parma? [34]

A. Yes, sir, and the Carl Randell ranch at New Plymouth.

Q. Did you tell them that Oreal Randell didn't have title in his name to the ranch at Eden?

A. No, I didn't know that.

Q. What did you say about his title?

(Testimony of J. Harold Abegglen.)

A. I didn't say anything, I didn't know there was a lien against the ranch there; Oreal Randell must have told them that himself; I didn't know that fact.

Q. That he didn't have title? A. Yes, sir.

Q. But you did advise Mr. Skeen and the Burnhams that Carl didn't have title, that he was buying that ranch on a contract? A. Yes, sir.

Q. When did you find that out?

A. When I visited the ranch.

Q. Do you remember who it was that went with you to the Ed Randell ranch?

A. The same parties that went to the Carl Randell ranch, a party of five of us.

Q. Who were they?

A. Jack Leighton, myself, Earl Burnham, Perry Burnham, and their son, Bob.

Q. Was any conversation held on that trip, on the visit to Ed Randell's ranch, about a mortgage?

A. I don't think it was discussed that morning, they were on purely an observation trip of the ranches.

Q. Who was to secure the abstracts of title for those various ranches, who looked after the securing of them, or who was to do that?

A. The mortgages and the papers?

Q. The abstracts of title, were they to be secured?

A. Yes, sir, by the Randell brothers.

Q. Was there any arrangement made for you to take care of securing the abstracts of title?

(Testimony of J. Harold Abegglen.)

A. No, sir, I think the request was made of Mr. Skeen that he remain in Boise and that we go to New Plymouth and Parma,—to take care of that immediately, and he said he had to go back to Salt Lake City, and that he would type up the agreements and send them for signatures, that he would take care of it by correspondence.

Q. At the time you visited the ranch at New Plymouth and Parma, what did Mr. Skeen do?

A. He remained in Boise.

Q. Do you know what activity he engaged in in Boise?

A. No, unless it was something in connection with the agreement.

Q. He remained in Boise and drafted the agreement that was put in evidence?

A. I think there was some detail taken care of.

Q. Did Mr. Skeen ask you to secure and send to him a description of these ranches, the three?

A. No, sir, otherwise, I would have remained in Boise; he gave me the impression that he would handle that himself.

Q. Do you recall that he asked you specifically about the title, and asked you to get a description of the property and secure the abstracts brought down to date? A. He did not.

Q. You visited the Cove Ranch in August when Mr. Skeen, Perry Burnham and Earl Burnham were there and negotiated with the Randells concerning some modification? A. I don't recall.

Q. Do you recall in August of 1948, Mr. Skeen

(Testimony of J. Harold Abegglen.)

and the two Burnham brothers were at the Cove ranch?

A. They were there several times during the summer, I was not advised what was going on or what was being transacted.

Q. Do you remember a conversation with Mr. Skeen at the Cove Ranch?

A. No, sir, I don't recall meeting Mr. Skeen at the Cove Ranch except when the inventory was taken.

Q. Do you recall in the presence of yourself, Mr. Skeen and Mr. Perry Burnham, that Mr. Skeen asked you to help out in the negotiations?

A. No, sir. [37]

Q. Do you recall that you told Mr. Skeen that you were not interested and that you didn't know whether they were wasting your time and gasoline in calling you to the ranch?

A. I made no such statement.

Q. When did you first learn that they were negotiating for a change?

A. When I saw the amended agreement.

Q. When was that? A. After August 12th.

Q. How long after?

A. I don't know exactly.

Q. Who advised you?

A. The Randell brothers.

Q. Had you secured information that a change had to be made because Carl Randell had not signed the mortgage? A. No, sir.

(Testimony of J. Harold Abegglen.)

Q. When did you first learn that Carl Randell refused to execute a mortgage?

A. In that amended agreement I saw that he had not executed a mortgage.

Q. And that was the first information you had?

A. Yes, sir.

Q. Did you receive letters from Mr. Skeen concerning the Cove Ranch in July and August? [38]

A. I received some letters from him.

Q. Did he inform you of any change?

A. He intimated some change but not where it was to take place, or what time, or anything.

Q. Did he ask you to help him out?

A. To this extent, that I take a further reduction in my commission.

Q. The deal had not progressed according to the original arrangement,—Mr. Carl Randell had not executed the mortgage?

A. I told Mr. Skeen that I would be glad to talk it over personally, to which he refused.

Mr. Bird: We move that reference to the contents of the letters be stricken on the ground that the letters themselves would be the best evidence.

Mr. Worthwine: We will produce the letters.

The Court: Very well, you may produce them.

Q. Handing you Defendants' Exhibits Nos. 10 and 11, I will ask you if you received those letters from Mr. Skeen? A. Yes, sir.

Mr. Worthwine: We will offer them in evidence.

Mr. Bird: No objection.

(Testimony of J. Harold Abegglen.)

The Court: They may be admitted. [39]

Q. You visited Twin Falls in the spring of 1949 in connection with this Cove Ranch?

A. Yes, sir.

Q. What time in the spring?

A. I think it was around the 3rd of April.

Q. How long did you remain in Twin Falls that time? A. One afternoon.

Q. Did you have any conversations?

A. I was invited by the Randells,—not on behalf of the Burnhams,—I was told there was a meeting and they asked me to come and attend.

Q. Where was that held?

A. At the Park Hotel.

Q. Who was present?

A. The Randell brothers, the Burnham brothers, Attorney Skeen and myself.

Q. How long did you remain there?

A. Until evening.

Q. And what was discussed?

A. The modification or the amended agreement to the original contract.

Q. Who did the talking, did Mr. Skeen?

A. Yes, he talked,—he was the mouth-piece more or less.

Q. Do you recall Mr. Perry Burnham requesting the Randells to continue in possession of the property, of the Cove Ranch? [40]

A. Only on the condition that they raise \$10,000.00.

(Testimony of J. Harold Abegglen.)

Q. That was the only amendment?

A. Yes, so we adjourned on that.

Q. It was \$10,000.00 or get out?

A. That is what they wanted.

Q. What was due on the contract?

A. There was nothing in default.

Q. The Randells insisted on going ahead under the terms of the contract?

A. Yes, sir, they would have liked to; they gave me that impression, that idea.

Q. They requested Perry Burnham and Earl Burnham to permit them to go on with the contract?

A. They asked to stay.

Q. They did at this meeting in your presence request Perry Burnham and Earl Burnham to go on with the contract?

A. Well, there was nothing in default on the contract.

Q. Did the Randells request Perry Burnham,—did Carl Randell request the Burnhams to let them go on under the contract?

A. The amendment of the contract,—the purpose was to make it possible to remain on the ranch.

Q. And why wasn't it possible to remain without an amendment?

A. They had not terminated the contract, they were not in default. [41]

Q. Had they moved off the ranch?

A. In April?

Q. In April of 1949?

A. I think so.

(Testimony of J. Harold Abegglen.)

Q. And they had taken every head of livestock off?

A. The livestock was moved off that winter.

Q. What time in the winter?

A. When the snow came.

Q. What happened with anybody that was living on the ranch? A. Nothing that I know of.

Q. Did any of the sheds cave in?

A. It could be.

Q. What was done with the equipment?

A. Just what was there.

Q. Did any of the tractors freeze up and the cylinder heads burst?

A. Not to my knowledge.

Q. You didn't know that Randell had abandoned the ranch, had left it?

A. They just moved off for the winter,—they intended to go back in the spring and really farm,—they told me that, that was their intention.

Mr. Worthwine: I move to strike that as a conclusion of the witness. [42]

The Court: I will strike it, possibly it should be allowed to stand in the record, but I will strike it.

Q. Do you know of any other winter that the ranch was left without anybody on it, with the equipment left there?

A. Not to my knowledge, but there was nothing to stay there for, the cattle were sold, a part of them were sold, and the rest were taken care of.

Q. There was no reason to stay on this ranch with equipment for 3300 acres of land there?

(Testimony of J. Harold Abegglen.)

A. It couldn't be farmed in the winter time.

Q. At this Twin Falls meeting Mr. Skeen made the remark in April of 1949 that if they couldn't come to an agreement,—the Randells and the Burnhams,—that the Burnhams had a cash buyer for the ranch? A. Mr. Skeen made that statement.

Q. All through the discussion you heard they desired \$10,000.00 cash, that was the condition the Burnhams took?

A. That was my understanding.

Q. Did you hear the Burnhams urge the Randells to go back and farm that place under the contract as it existed? A. No, sir.

Q. What conclusion had been reached by the time you left? A. No conclusion reached. [43]

Q. When did you learn what the outcome was?

A. The next day.

Q. Where? A. At Hailey.

Q. And what did you learn?

A. I received a phone call that afternoon from Twin Falls.

Q. From whom?

A. From the Baldwin Real Estate on this cash deal, he advised me the deal was there.

Q. I am not asking you what you were advised.

Mr. Bird: I think he should be permitted to answer the question.

The Court: I think he has answered it.

Q. You testified that Mr. Leighton had given you an agency contract to sell the Cove Ranch?

(Testimony of J. Harold Abegglen.)

A. That is right.

Q. Where is that?

A. I cannot say, I thought it had no more use, the Burnhams advised me that I should deal with them and they gave me a listing.

Q. How long had you been attempting to sell under the Leighton deal?

A. The spring of 1948. [44]

Q. The same spring that you dealt with the Burnhams? A. That's right.

Mr. Worthwine: I think that is all.

Mr. Bird: That is all.

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

February 9, 1950, 10:00 o'Clock A.M.

OREAL RANDELL

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Where do you live, Mr. Randell?

A. Eden.

Q. What is your business? A. Farming.

Q. How much land do you operate?

A. Thirty acres of cultivated ground, forty acres of cultivated pasture, and two hundred acres of dry pasture.

(Testimony of Oreal Randell.)

Q. About 200 acres that was used for pasture?

A. Yes, sir.

Q. What is your total acreage?

A. I think it is about 241 acres, I am not sure,—
I mean 341 acres.

Q. How long had you been operating this ranch?

A. About 18 years.

Q. Did you prove up on your ranch?

A. No, sir.

Q. From whom did you buy it?

A. The home eighty from father.

Q. You are one of the gentlemen whose name is signed to the contract relative to the Cove Ranch?

A. Yes, sir.

Q. Were you present at a meeting when the contract was being discussed and planned,—the contract for the purchase of the Cove Ranch?

A. Yes sir, at Boise, here.

Q. Who was at that meeting besides yourself?

A. My two brothers, the two Burnham brothers, Mr. Skeen and Mr. Abegglen and also Mr. Jack Leighton, and Bob Burnham.

Q. At that meeting and during the preliminary stages of making this contract was the situation relative to your ranch discussed. A. Yes, sir.

Q. And what was the substance of that discussion concerning your ranch?

A. Well, as I remember, it was discussed if I had a loan on my property, which I told them that I did have; other than that I don't know that anything was said. [46]

(Testimony of Oreal Randell.)

Q. Was the amount of the loan mentioned?

A. Yes, sir.

Q. And what was that?

A. Approximately \$6,000.00, I think I gave it.

Q. Was Mr. Skeen and the Burnhams,—these two gentlemen (indicating) there?

A. Yes, sir.

Q. Were they present when this matter was discussed? A. Yes, sir.

Q. What would you consider the fair market value of that ranch at that time?

Mr. Worthwine: We object to that as incompetent, irrelevant and immaterial and not the proper way to prove market value.

Mr. Bird: I think he can state what the market value of his own property was.

The Court: It is not material so far as your complaint is concerned, but it might be if you are contemplating their defense.

Mr. Bird: Perhaps we can call him later on this matter.

The Court: Very well, you may do that.

Q. After this contract for the purchase of the Cove Ranch was entered into, what did you do,—did you help to farm it in 1948? [47]

A. Not very much, I was there several times but I didn't have much to do with operating it.

Q. Your brother was up there?

A. Yes, sir.

Q. Did you make plans for taking it over in 1949?

(Testimony of Oreal Randell.)

A. Yes, sir, I leased my ranch at Eden with the intention of going up there.

Q. Do you know whether or not you or your brothers made an application to refinance?

A. Yes, sir.

Q. What was the result of that?

A. It seems as though the loan,—as far as the ranch was concerned, if all the conditions,—in other words,—when I came up to see the Prudential people there were three applications for a loan to buy the ranch and they wanted to know just who wanted to borrow the money.

Q. Who had applications to buy that ranch?

A. I think Stewart and Leighton.

Q. The applications were for a loan on the Cove Ranch? A. Yes, sir.

Q. Did these applications purport to say who was the owner of the ranch?

Mr. Worthwine: We object to that as incompetent, irrelevant and immaterial.

The Court: Sustained. [48]

Q. What was done in the matter of operating the ranch in 1948?

A. The hay was put up,—a large portion of the ranch was leased and grain raised.

Q. Was the dairy operated?

A. Yes, sir, cows were taken care of.

Q. What was done with the dairy produce?

A. Half was applied on the indebtedness that the Kraft Cheese Company had.

(Testimony of Oreal Randell.)

Q. Whose indebtedness was that to the Kraft Cheese Company?

Mr. Worthwine: We object to that, it is assumed under the contract.

Mr. Bird: I will withdraw the question.

Q. Who owed the Kraft Cheese Company?

A. I suppose that we did after we took over the ranch.

Q. Was this indebtedness to the Kraft Cheese Company against the stock when you took it over?

A. Yes, I understood it was.

Q. Do you know how much was applied on the Kraft loan while you had the ranch?

A. No, I don't.

Q. What was done with the grain?

A. It was turned to the Burnham brothers.

Q. How much was that, do you know?

A. I would say approximately \$12,000.00. [49]

Q. And was some of the cattle sold?

A. Yes, sir.

Q. And what was done with the proceeds from that source? A. It was turned to Burnhams.

Q. Did you do any plowing on the ranch?

A. Yes, sir.

Q. How much? A. About 200 acres.

Q. Was that plowed or disced?

A. Some of it was plowed and some of it disced.

Q. Did you do any improvement on the ranch?

A. Yes, sir, to the house.

Q. How much?

(Testimony of Oreal Randell.)

A. Two rooms added on,—the interior was decorated and also a new roof,—new shingles.

Q. What was the next contact that you had with the Burnhams after the original contract was signed?

A. I don't recall in particular any one, I think I met them at the ranch the next time.

Q. You had a modified contract in August?

A. Yes, sir.

Q. You were present at that time?

A. No, I don't think I was.

Q. Do you remember the reason for the new contract being drawn? [50]

A. It was in regard to my brother's default, Carl's default on his first deal,—on the original contract,—he couldn't produce the mortgage on his property.

Q. What did you do in regard to the ranch at the end of the farming season?

A. With that much plowing done, along about December we did move the rest of the stock out and vacated the place for that winter.

Q. Was your program to return in the spring?

A. Yes, sir.

Q. Was all the stock moved off the ranch for the winter?

A. All the cattle were moved away from the ranch.

Q. You took them to your home ranch?

A. Took them to the ranch at Eden and fed them there.

(Testimony of Oreal Randell.)

Q. Did you make arrangements for a caretaker to look after the property?

A. Yes, sir, a fellow named Baldwin was to watch things and keep the snow off and so on.

Mr. Bird: That is all, you may cross-examine.

Cross-Examination

By Mr. Worthwine:

Q. Where did Mr. Baldwin live?

A. Across the highway from the entrance to the ranch. [51]

Q. Did you go back to the ranch again?

A. Yes, sir, off and on quite a few times during the winter.

Q. Did you install any plumbing in the ranch House? A. Yes, sir, I think there was some.

Q. Did it remain there or was it torn out?

A. It remained there.

Q. It was there the last time you saw it?

A. That's right.

Q. What was it in the way of plumbing that you installed?

A. I didn't have much to do with that, I cannot tell you.

Q. You don't know much about that, nor the operation of the ranch in 1948 and 1949?

A. I wasn't there so I don't know too much about it.

Q. Were you familiar with the equipment that was turned over to you and your brothers when you took possession?

(Testimony of Oreal Randell.)

A. I think I knew a little bit about it.

Q. What equipment was there when you took possession?

A. As I recall it there two tractors, a twin-7 mower, hay bailers, a couple of side rakes, milking equipment, a couple of coolers, two or three sets of harness, I think a vise and a few small tools.

Q. Some shingles? A. Yes, sir.

Q. Do you know what happened to the [52] shingles? A. Yes, sir.

Q. What was it?

A. They were applied on this account with the Lumber Company that we had done to the house.

Q. The shingles were applied on the material that went into the roof? A. That's right.

Q. You mentioned a contract modified in August, I didn't hear the reason you gave for the modification?

A. As I understand it, it was on account of my brother Carl's default in the original contract.

Q. Your brother Carl agreed to give a mortgage on his place in New Plymouth in the amount of \$25,000.00? A. That's right.

Q. Did he ever give such a mortgage to the Burnhams? A. I don't think so.

Q. He refused?

A. I don't know whether he refused, he just couldn't produce it.

Q. He just didn't do it? A. That's right.

Q. Do you recall what equipment you and your brothers moved to the Cove Ranch in 1948?

(Testimony of Oreal Randell.)

A. A Fox Chopper and wagons, a 2-D Caterpillar Crawler and Discs. [53]

Q. When were they moved?

A. In the fall of 1948,—the caterpillar wasn't brought up until after the first of the year.

Q. Where were they taken?

A. They were taken to Kimberly.

Q. Where was your brother Carl then living?

A. At Kimberly.

Q. He had moved from New Plymouth?

A. Yes, sir.

Q. And had gone to Kimberly?

A. Yes, sir.

Q. Was that in the fall of 1948 when part of this equipment that Carl Randell put on the place was removed?

A. Yes, sir.

Q. The rest of it early in June of 1949?

A. Yes, sir.

Q. You leased your ranch, you said?

A. Yes, sir.

Q. Did you deliver possession?

A. Yes, sir.

Q. To your tenant?

A. Yes, sir.

Q. How many tons of hay did you produce on the Cove Ranch in 1948?

A. I would say approximately 180 tons. [54]

Q. How many acres of hay?

A. I cannot say.

Q. How many acres are there of irrigated land in that ranch?

A. Approximately 1500 acres, I understand.

Q. You testified that you had 341 acres of land,

(Testimony of Oreal Randell.)

—in whose name was the title to that land?

A. Well, I had a Land Bank loan and I presume the title should be in my name.

Q. Was any taken in the name of your wife?

A. Well, no, she was just as husband and wife, I don't understand much about that business.

Q. Well, has there been any probate proceedings involving that land during the last two or three years? A. Yes, sir.

Q. That was the estate of your deceased wife?

A. Yes, sir.

Q. Had the probate proceedings been started in May, 1948? A. No, sir.

Q. When was the first time you met the two Burnhams, the defendants in this case?

A. Up here in Boise.

Q. You didn't meet with them at a meeting in Twin Falls in April? A. No, sir.

Q. And were not present at the meeting where you or any brothers, [55] or the plaintiff were and had a conference with the defendants in this case before the one in Boise?

A. No, I believe not.

Q. Who was present at the meeting in Boise?

A. There was I, and my two brothers, the Burnham brothers, Mr. Skeen, Mr. Abegglen and Jack Leighton.

Q. That is the first time,—this meeting in Boise was the first time you ever discussed with the Burnhams the purchase of the ranch?

A. That's right.

(Testimony of Oreal Randell.)

Q. And that is the place where you agreed, so far as you were concerned, these terms were agreed upon? A. That's right.

Q. That is the place where the question of giving the three mortgages was agreed to?

A. Yes, sir.

Q. Did you advance personally any money for the payment of water charges? A. Yes, sir.

Q. In May, 1948, you sent the money to whom?

A. To Mr. Abegglen.

Q. Did you advance any money for taxes?

A. Yes, sir.

Q. Mr. Abegglen placed in evidence a copy of a letter addressed to you, do you remember whether you received [56] the original of that?

A. Yes, I believe I did.

Q. The amount of money that is mentioned in there, did you advance it? A. Yes, sir.

Q. Mr. Abegglen didn't pay those amounts personally, he paid them, but you advanced the money?

A. That's right.

Mr. Worthwine: That is all.

Redirect Examination

By Mr. Bird:

Q. Do you have the tax receipts for those tax payments? A. No, sir.

Q. Do you remember about what it was?

A. I think about \$850.00, approximately for one-half of the taxes.

(Testimony of Oreal Randell.)

Q. That is the first half of 1948?

A. Yes, sir.

Q. Were you present at a conference that took place where you gave the Burnhams a quitclaim deed for this Cove Ranch? A. Yes, sir.

Q. When you turned it back to them?

A. Yes, sir.

Q. Were you present at a conference in the early part of [57] April, 1949, when this situation was agreed upon? A. Yes, sir.

Q. And at that time, or in connection with that, was any amount due on the contract?

A. No, sir.

Q. Was a demand made for the payment of money at that time?

A. They wished to know if we would be able to meet the interest due at the time of the contract.

Q. When was that?

A. I think it was around the 12th of May.

Q. What amount of money did they request you to produce?

A. I think, as I recall, it would have been \$5,400.00.

Q. Did they request any additional sum?

A. When we entered into this agreement we agreed to give them \$6,000.00.

Q. Did they make a request for an additional sum to permit the original contract to remain in effect?

Mr. Worthwine: We object to that as incompe-

(Testimony of Oreal Randell.)

tent, irrelevant and immaterial, he has testified what it was for.

The Court: He may answer.

A. No, we tried to come to some other agreement as I remember,—it would have taken another consideration to make that agreement. [58]

Q. Were you and your brothers interested in retaining the ranch under fair terms?

A. Yes, sir.

Mr. Bird: That is all.

Recross-Examination

By Mr. Worthwine:

Q. Were you interested in retaining it under the terms of the contract then in force?

A. Under the old contract?

Q. Yes.

A. Yes, we would have went on if the conditions had not made it such that it looked like it would be better to quit.

Q. What were those conditions?

A. The main objection was my mother became ill and it was pretty near necessary for me to stay and take care of her.

Q. That illness of your mother was what prevented you from going ahead with the contract?

A. That was the main thing, and the finance that looked like it would be hard to get; if they had set the interest back and the fall payment, I think we could go ahead.

(Testimony of Oreal Randell.)

Q. But under the contract as it existed you could not?

A. We deemed it better not to go on.

Q. Who called the conference that was held in Twin Falls in April, 1949? [59]

A. I think the Burnhams.

Q. Did you telephone to Salt Lake City at any time concerning it?

A. I believe we had a conference as to where it was to be.

Q. Isn't it a fact that Mr. Perry Burnham at that conference when you signed the quitclaim deed, offered to finance you if you would go ahead with the contract as it existed?

A. I don't recall that.

Q. As far as you knew he had no right to insist on a forfeiture at that time? A. No, sir.

Q. You did discuss the payment of interest that would come due in May? A. Yes, sir.

Q. You said that you removed certain livestock from the Cove Ranch, did you take them to your place? A. Yes, sir.

Q. Of what did they consist?

A. I think it was 26 Holstein cattle.

Q. Dairy stock?

A. Young stock, calves, steers and heifers.

Q. Was it about 37 head, to refresh your memory?

A. Well, we were speaking of my place,—I think I had 26 head, there were also a few head at my brother's place. [60]

(Testimony of Oreal Randell.)

Q. Who was the owner?

A. I understood it was Mr. Burnham.

Q. In this deal that was made in May, that livestock was turned over to you?

A. That's right.

Q. You acquired title under your settlement that was made? A. That's right.

Q. Among other things in that settlement you agreed to you \$6,000.00? A. Yes, sir.

Q. Has that ever been paid? A. No.

Q. When Mr. Burnham asked you if you could produce the interest in the amount of \$5,400.00 due in the month of May, what did you say?

A. I told him that it would make it very inconvenient to borrow the interest money and also the running expense on that big spread.

Q. You told him that you couldn't do it?

A. I didn't tell him that I couldn't do it.

Q. You told him that on account of the illness that you couldn't go up?

A. I told him I would rather not. [61]

The Court: How much did you pay him on this, —I think you said some \$12,000.00 out of the grain?

A. Out of the proceeds of the crops.

The Court: Do you have those figures?

A. No.

Q. Did you ever pay Burnhams any money outside of what was produced on the ranch in the way of grain and the sale of the dairy stock?

A. No, sir.

Mr. Worthwine: That is all.

(Testimony of Oreal Randell.)

Redirect Examination

By Mr. Bird:

Q. You did pay out of your own money independent of the crops, those taxes, water assessments and so forth shown in this letter from Mr. Abegglen?

A. That's right.

Q. That was additional to the payments out of the property that was there, that was from your own pocket?

A. Yes, sir.

Q. With reference to the \$6,000.00 obligation, is that due yet?

A. Yes, it was due last,—no, it will be due this coming May.

Q. The cattle you took to your ranch and your brother's place, the 26 head that you took and the few that he took, what was done with these cattle in the final windup? [62]

A. They gave me a bill of sale to them.

Q. They were turned to you and your brother?

A. Yes, sir.

Q. Did I understand you correctly, that you came to this meeting in April, 1949, at the request of Mr. Burnham?

A. I believe that is right.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

ED RANDELL

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Your name is Edward Randell?

A. Yes, sir.

Q. Where do you live, Mr. Randell?

A. At Parma, Idaho.

Q. What is your business? A. Farming.

Q. How long have you been farming?

A. All my life.

Q. How much land are you farming now?

A. I think 81 acres is irrigable, 25 acres that is considered as dry pasture.

Q. Is that the same farm that you were on in 1948? A. That's right. [63]

Q. Were you present, strike that,—you are one of the Randell brothers who signed this contract with the Burnham's A. That is correct.

Q. Were you present at the first meeting about May 11th, 1948, in Boise?

A. At Boise, yes, sir.

Q. When was the first meeting with the Burnhams,—was it here or at your ranch?

A. It was here at the Boise Hotel.

Q. You were here at the hotel with this group of other people who has been mentioned?

A. I was.

Q. How long did you spend in discussing the features of this contract?

(Testimony of Ed Randell.)

A. I don't recall how long, but I presume it was close to midnight when I left.

Q. Was your ranch discussed? A. Yes, sir.

Q. The program was that you were to give a mortgage to help secure the \$70,000.00 payment?

A. It was.

Q. And was the situation relative to your ranch talked about? A. It was.

Q. And what was that discussion? [64]

A. I told Mr. Skeen that there was a first lien of \$4,000.00 or some better against it. I recall that I gave him a statement from Denver stipulating what the lien was.

The Court: I have read the answer of the Defendants and it appears to the Court that you are assuming the burden of defending against the answer of the Defendants. I ruled as to the other witness that was on the stand that was immaterial until the Defendants put in their case. I simply mention this, it appears to me that you are presuming what their defense will be.

Mr. Bird: Very well, thank you, Your Honor.

Q. After this agreement was signed did you take any part in operating the Cove Ranch in 1948?

A. No, I was operating my farm at Parma; I did go to the ranch a time or two, but I didn't operate it.

Q. Who was operating the ranch in 1948?

A. That was my brother Carl.

Q. Were you there on a few occasions?

(Testimony of Ed Randell.)

A. On two occasions, if I recall.

Q. Did you take part in making the application for a loan to the Federal Land Bank?

A. I went to Jerome, yes.

Q. Did you have anything to do with selling the grain and cattle that were sold off the ranch?

A. I wasn't present at that time. [65]

Q. Were you present at the conference in August, 1948?

A. Yes, that was when the duplicate of the contract was made.

Q. The modification of the contract?

A. Yes, I was there.

Q. What was the reason for that modification?

A. My brother Carl had become defaulted in the first agreement, that he agreed to give a mortgage on his property and wasn't able to do it.

The Court: Isn't that all covered by the agreement?

Mr. Bird: Generally it is.

Q. Did you you make any arrangements to go ahead and take part in farming the place in 1949?

A. Yes, I leased my place at Parma and we were all packed up; we figured we would go up and help my brother Mike farm the place.

Q. What prevented you from doing that?

A. Principally the ill health of my mother, my brother Mike felt that she had to be taken care of and the conditions didn't look good,—like it would be hard for us, a hard task for us to accomplish.

(Testimony of Ed Randell.)

Q. Who called you to the meeting in April of 1949?

A. I think the Burnhams requested us to have a conference.

Q. Did they make any request to or upon you at that time for any substantial sums of money? [66]

A. As I recall the interest due in May was asked.

Mr. Worthwine: We object to that as a conclusion; he may state the substance of the conversation, what was said.

The Court: Yes, just state what was said.

Mr. Worthwine: And please identify which Burnham did the talking.

Q. What did Mr. Burnham or either of them say about this money, if you know which one said it, specify that?

A. As I recall, the interest was spoken of that would be due on May 12th; he asked if we thought we would be able to meet that with the overhead expenses to operate the ranch. Brother Mike said it looked like it would be a rather hard pull.

Q. Did they say anything about having a cash buyer for that place?

A. I don't recall any cash buyer, there was a deal pending if we failed, that was talked as though we were not going to be able to go ahead with the ranch.

Q. Did Mr. Burnham ask you to turn the ranch back? A. No, not that I recall.

Q. You did turn it back on that meeting?

A. We turned it back as has been said before.

(Testimony of Ed Randell.)

Q. That was a mutual agreement by you and your brothers and the Burnhams? [67]

Mr. Worthwine: The contract speaks for itself.

Mr. Bird: Very well, you may cross-examine.

Cross-Examination

By Mr. Worthwine:

Q. When was the first time you saw the Burnham brothers, or either of them?

A. The first that I met them was at the Boise Hotel on May the 12th, I think it was.

Q. You had never seen them before?

A. No, I hadn't.

Q. You didn't attend the meeting in Twin Falls in April where the two Burnhams, Mr. Skeen and Mr. Abegglen were present? A. I did not.

Q. And you didn't agree to the contract at that time for the purchase of the Cove Ranch in April?

A. I wasn't there.

Q. You were not there when Mr. Abegglen under the dictation of Mr. Skeen wrote the contract for the purchase of the ranch,—the Cove Ranch?

A. That was when?

Q. In April, 1948.

A. I wasn't present at the time, no, sir.

Q. What were you told by Mr. Burnham when he asked if you and [68] your brothers would be able to pay the installment of interest and operate the ranch, what was your answer to that?

A. I had no chance whatever to pay.

(Testimony of Ed Randell.)

Q. Could your brothers meet it, the other two that were interested?

A. It is possible that my brother Mike could.

Q. You heard him testify that he had illness in the family that prevented him from going there?

A. Yes, sir.

Q. Did you know of that illness?

A. Yes, sir, I did.

Q. That is one of the principal reasons that he wanted out of the contract?

A. That was the main reason that we didn't continue on.

Q. How much does it cost to operate that place during a year?

A. I wouldn't know,—I didn't operate it.

Q. You were in possession of it a part of the time, did you make any estimate in the spring of 1949 as to what it was going to cost,—how much for wages, for water charges and the last half of the 1948 taxes?

A. I don't recall going over it.

Q. Do you think it would run as much as \$25,000.00?

A. I don't recall what it would run. [69]

Q. You and your brothers concluded that you couldn't do anything about that ranch under the contract that you had?

A. We didn't think,—or that is, we did think it would be the logical thing to get a release.

Q. You wanted out from under your \$25,000.00 mortgage you and your wife signed?

(Testimony of Ed Randell.)

A. We were perfectly willing to release our equity in it.

Q. You say you were packed and ready to go up?

A. Yes, sir, we had rented the place and gave possession.

Q. What time of the year was that?

A. In April.

Q. Where did you move to when you gave up possession of your ranch?

A. We have two homes on the place; I retained one and we were living in that.

Q. Have you been living there since?

A. After we made the last agreement with Burnhams we went back.

Q. Did you take possession of the ranch back?

A. No, we couldn't, it is leased to the first of March.

Q. Is your brother Carl in the court room?

A. Yes, sir.

The Court: Did you approach the Burnhams or did the Burnhams approach you to do away with this contract?

A. As I recall the Burnhams suggested it might be the logical [70] thing to do.

The Court: Was that a visit from they to you or from you to them?

A. It was at the Perrine Hotel, I presume it was at the suggestion of both parties.

The Court: Did you call them or they call you?

(Testimony of Ed Randell.)

A. Well, arrangements were made to meet.

The court: Who made the arrangements?

A. Very often it was at the request of Mike Randell.

The Court: Well, did you call them at that time or did they call you?

A. I don't recall just that incident.

The Court: Were you in default on the contract at that time? A. No.

Q. (By Mr. Worthwine): Who telephoned you to attend the conference in May, 1949?

A. If I recall I was down here on account of mother's ill health.

The Court: Did you hear your brother testify that Burnham called him and asked for this conference?

A. If I recall, that is correct.

The Court: That is all I have.

Mr. Worthwine: That is all. [71]

Mr. Bird: Nothing further.

CARL RANDELL

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Where do you live, Mr. Randell?

A. At Kimberly.

Q. What is your business? A. Farming.

Q. How long have you been farming?

(Testimony of Carl Randell.)

A. Practically all my life.

Q. How long have you farmed the ranch you are now on at Kimberly? A. Last year.

Q. Where were you farming in 1948?

A. At the Cove Ranch.

Q. And prior to 1948?

A. At New Plymouth.

Q. How many acres in the ranch you had there?

A. Now?

Q. No, prior to 1948, at New Plymouth?

A. Seventy acres of farming ground.

Q. How much other than that?

A. 230 acres,—there was a pasture. [72]

Q. When did you acquire that ranch?

A. I believe in 1947 or '46.

Q. How did you acquire it?

A. On a contract.

Q. Payable on the installment plan?

A. That's right.

Q. Will you tell me whether you were at a meeting at the Boise Hotel that has been discussed here on the 11th and 12th of May? A. Yes, sir.

Q. When did you first meet the Burnhams?

A. At Twin Falls.

Q. Was it previous to this time?

A. Yes, sir, previous to this.

Q. At this meeting or rather at these meetings, were all the terms of the contract discussed?

A. At the Twin Falls meeting that agreement was just kind of an agreement as to what could be done in regard to purchase of the place with the

(Testimony of Carl Randell.)

Burnhams; nothing signed that night,—I just happened in there; I took copies down and showed them to my other brothers.

Q. At these meetings, particularly this one at Boise, was the condition of your ranch discussed?

A. It was discussed with Mr. Abegglen at home and at Boise.

Q. And at this discussion were these other gentlemen present? A. Yes. [73]

Q. What was the substance of the discussion?

A. It was brought up that I had very little in my ranch, but if I could sell it for \$40,000.00, having bought equipment and so on, I would like to pay off this indebtedness on this Kraft cows; it was mentioned that I didn't have as much in it as the other boys.

Q. Did you farm the Cove Ranch in 1948?

A. I put up the hay,—the rest was leased out to Mr. Stellmon and Mr. Kimbrough, they had all the grain.

Q. Did you operate the dairy? A. Yes, sir.

Q. And what was done with the milk and dairy products?

A. A part applied on the indebtedness of the cows that were bought from the Kraft Cheese Company, the rest was labor and upkeep as we went along, as much as we could get.

Q. Who had signed this contract with the Kraft Cheese Company, the Burnhams or you?

A. Originally, Mr. Leighton, and then Mr. Burnham took it over.

(Testimony of Carl Randell.)

Q. Who is Mr. Leighton?

A. Cliff Leighton.

Q. What was his connection with the ranch?

A. Well, he must have owned it at one time.

Q. Was he on the ranch ahead of you?

A. Yes, sir. [74]

Q. In your deal did you take over this obligation with Kraft? A. Yes, sir.

Q. Do you know how much was paid on this Kraft account during the time you were on the ranch?

A. Between \$1700.00 and \$1900.00, I haven't the exact figures but they are here somewhere.

Q. Were some of the cattle sold while you were there? A. Yes, sir.

Q. What was done with the proceeds of those sales? A. It was given to Mr. Burnham.

Q. Do you know how much that was?

A. No, sir, I don't.

Q. Did you discuss these sales from time to time with the Burnhams?

A. Yes, sir, I always had a written order from Burnham to sell or dispose of any animals.

Q. Handing you Exhibit No. 12, are you familiar with that? A. Yes, sir.

Q. What is that?

A. That is a letter written for me to take down one Holstein bull; 16 steers and 6 cows and one grade Guernsey cow to the stock yard sale and have the check made to Perry Burnham and send it to Salt Lake City. [75]

(Testimony of Carl Randell.)

Mr. Bird: We offer this in evidence.

Mr. Worthwine: No objection.

The Court: It may be admitted.

Q. Were other letters written to you along that line?

A. Not that I recall. On the last disposal of the cattle I called Mr. Burnham from the ranch and had him call Mike to get his approval to sell the rest of the cattle.

Q. And now, Mr. Randell, did you do some improvement work on the ranch?

A. We improved the house.

Q. How did you improve it?

A. The porch along there we made it into two rooms; it was ready to fall down and we made two rooms with a bath, we didn't complete it, but we put on a roof, a roof of 20 year guaranteed roofing.

Q. Did you put any improvements in any of the other houses?

A. We put the plumbing out of the big house into the small house and papered that and cleaned them all up.

Q. Did you take place at the meeting in August, 1948?

A. I was there at the ranch, yes, sir.

Q. What was the occasion for that meeting?

A. Well, I had become defaulted in this way, on the contract, if I made a sale I would not have anything to give a mortgage on, and if I was to turn the proceeds, but I sold at such a sacrifice that I

(Testimony of Carl Randell.)

didn't have anything left, any equity, and by the time I paid for my equipment it [76] left us without anything and I couldn't give the mortgage.

Q. Did you buy some equipment?

A. Yes, I borrowed money and bought a Fox hay chopper and a tractor.

Q. With the proceeds of the ranch?

A. That is borrowed money.

Q. Your brothers mentioned a caterpillar?

A. That was mine.

Q. How much did the hay chopper cost?

A. \$4,200.00.

Q. And the caterpillar you had?

A. Yes, sir.

Q. Did you buy any other equipment?

A. I didn't buy any other, but the brothers had a John Deere plow that stayed there until April 14th after we signed this agreement.

Q. How long did you stay on the ranch in 1948?

A. Until December with the family, and then I was back and forth; we had a man there until the 22nd and then he blew up.

Q. What did you do with the stock?

A. We moved it down to Eden and my place, we had three or four cows.

Q. The snow gets pretty deep up there in the winter time? A. Yes, sir. [77]

Q. Would the stock be better off lower down?

A. That's right.

Q. Were you present at the conference in Twin Falls the first of April? A. A part of it.

(Testimony of Carl Randell.)

Q. The Burnhams and your brothers were also there? A. Yes, sir.

Q. Mr. Abegglen was there?

A. Yes, sir, at different occasions, once I remember him being there.

Q. Was anyone else there? A. Mr. Skeen.

The Court: I think we will recess at this time for fifteen minutes.

February 9th, 1950, 11:20 A.M.

Q. Now about the persons present at this conference on April 14th, if that was the date, 1948—do you remember seeing Mr. Baldwin there?

A. The last time, yes.

Q. Did you know his interest in the matter?

A. He had a buyer for the ranch.

Q. Did he say that he was a cash buyer?

A. Not to my knowledge.

Q. During that conference was any suggestion made about you gentlemen raising \$10,000.00? [78]

A. It was discussed or talked about if we could revamp the contract then it was talked if we could raise \$10,000.00—yes, it was talked about in the discussion.

Q. What was the decision on that?

A. We never came to anything on that.

Q. Do you know about the amount of grain sold on that ranch and credited on your contract in 1948?

A. Around \$12,000.00.

Q. Do you know approximately how much it was?

(Testimony of Carl Randell.)

A. Yes, it was around \$12,000.00.

Q. And the cattle, that was about how much?

A. I would say roughly around another \$12,000.00.

Q. And would that include the shipment made late in the year about December?

A. I never got a report on the last shipment.

Q. Who got that?

A. That check was mailed to Mr. Burnham at Salt Lake City, Utah.

Mr. Bird: That is all, you may inquire.

Cross-Examination

By Mr. Worthwine:

Q. That grain was produced by the people who had part of the ranch rented?

A. Mr. Stellmon and Mr. Kimbrough. [79]

Q. You had nothing to do with its growing, threshing or sowing?

A. We had to see that they got water, to keep the stock out, it was our job to see that they were protected.

Q. In regard to this contract in 1949—I think it was mentioned before as 1948—at this conference in Twin Falls in 1949 you stated that \$10,000.00 was discussed?

A. We were talking about what could be done.

Q. How much money you could raise?

A. He wanted to know if we could raise \$10,000.00 and we could revamp the contract.

(Testimony of Carl Randell.)

Q. What was it to be used for?

A. I don't know.

Q. Who was it to be paid to?

A. Mr. Burnham.

Q. Did the Burnhams make a demand for \$10,000.00? A. No, sir.

Q. He didn't say, "You have to pay \$10,000.00 or else"? A. No, sir.

Q. That \$10,000.00 was discussed in connection with having the contract revamped?

A. That is right.

Q. When did you move to Kimberly?

A. The 10th of December.

Q. What year? [80] A. 1948.

Q. Was it to a ranch? A. Yes, sir.

Q. Did you have a lease on it? A. Yes, sir.

Q. You entered into that lease before you moved on it?

A. Yes, sir, I have two boys 22 and 17 years old, they were to farm that ranch.

Q. How many acres in that ranch?

A. Just 80.

Q. What equipment did you move from the Cove Ranch to the Kimberly ranch?

A. My caterpillar and the hay chopper and disc.

Q. You took that equipment away that you placed on the ranch in 1948? A. Yes, sir.

Q. Was any of the plumbing that was placed in the buildings at the Cove Ranch removed?

A. The sink was removed from the big building and put in the small building.

(Testimony of Carl Randell.)

Q. Was any taken away from the ranch?

A. My personal property.

Q. What was it?

A. A hotpoint sink, stove and tank.

Q. You took those out?? A. Yes, sir. [81]

Q. They were connected up?

A. I connected them myself.

Q. You had water in them?

A. Not in the fall, I unconnected them or left them unconnected.

Q. The August meeting was brought about because you refused to sign the mortgage?

A. Yes, sir.

Q. When did you acquire the New Plymouth place? A. In 1946 I think it was.

Q. In the spring of 1948, what crops were growing there? A. Sugar beets.

Q. How many acres? A. Forty.

Q. What other crops?

A. We had it ready for corn.

Q. Do you remember the occasion of Mr. Burnham going to your ranch in 1948?

A. Yes, sir.

Q. Did you show him the growing crops?

A. Yes, I wanted to show him how we were farming.

Q. All you had was a contract to buy?

A. Yes, sir.

Q. When you sold the contract—you never received any deed? [82] A. A quitclaim deed.

Q. Anything recorded to you? A. No, sir.

(Testimony of Carl Randell.)

Q. When you sold the ranch you gave a quit-claim deed? A. Yes, sir.

Q. You received no deed yourself?

A. No, sir.

Mr. Worthwine: That is all.

Redirect Examination

By Mr. Bird:

Q. When Mr. Burnham saw your beet crop and the other crops, did he make any remark about them?

A. He remarked how nice they were.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

CLIFTON B. LEIGHTON

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Where do you live, Mr. Leighton?

A. Salt Lake City, Utah.

Q. Where were you living prior to 1948?

A. At the Cove Ranch in Blaine County.

Q. How long had you been on that ranch? [83]

A. Approximately 18 months.

Q. What was your interest in the ranch?

A. I had purchased it on a purchase contract.

Q. From whom?

A. The Chipman people at American Fort, Utah.

(Testimony of Clifton B. Leighton.)

Mr. Worthwine: We object to that as being entirely immaterial.

The Court: He has answered and it may stand.

Q. Did you have any phone conversation with Mr. Burnham about this ranch in 1948?

A. Yes, sir, I did.

Q. Concerning the sale of it?

A. Yes, sir.

Q. What was that?

Mr. Worthwine: We object to this as entirely incompetent, irrelevant and immaterial; it does not pertain to any issue in this case whatever.

The Court: Inasmuch as the court has control of the matter, I will let him answer.

Q. What time was this conversation?

A. As to the sale?

Q. The conversation with Mr. Burnham.

A. Pertaining to this sale?

Q. Yes. [84]

A. It was at the time they were at Twin Falls talking about the terms of this contract.

Q. What was the substance of this conversation?

A. He called me and told me that they could sell it and the terms they could sell it under and asked for my approval of the sale, which I gave.

Q. Did you later have any conversation with his attorney, Mr. Skeen?

A. Yes, sir, many times.

Q. About this ranch? A. Yes, sir.

Q. What was the substance of this conversation?

(Testimony of Clifton B. Leighton.)

Mr. Worthwine: Will you fix the time and place and what was said?

Q. First, when you had the one—strike that—the first one you had, Mr. Leighton, after the sale?

A. I talked to Mr. Skeen practically every day, not to exceed three days apart from then until I surrendered possession of the ranch to the Randell brothers.

Q. Did you ever talk about this contract with Randells being satisfactory or unsatisfactory?

A. Yes, sir, at the ranch at least three different times—I was concerned about these mortgages, if they were worth the money and if the title was good, the condition of that. He being my personal attorney at that time I requested him to make an investigation as to the title [85] and putting the mortgages of record so they were legal in their form.

Q. What did he say about that?

A. The day they came to the ranch to make this inventory I asked him at that time, I said: "Have you got this mortgage and have you got them all recorded, are they good so that I can turn this stuff to these people," and he said: "Yes, you can turn them over now, everything is in order."

Mr. Bird: That is all.

Cross-Examination

By Mr. Worthwine:

Q. How many tons of hay could be produced on that ranch?

(Testimony of Clifton B. Leighton.)

A. Well, we figured right at 2,000 tons.

Q. Did you ever discuss this deal with Mr. Abegglen?

A. Yes, sir, during the time and after.

Q. Did Mr. Abegglen tell you when he was to get each \$2,000.00 of the commission?

A. Yes.

Q. What did he say?

A. The understanding was—in several different conversations with Mr. Burnham and Mr. Skeen, in different conversations that was had——

Mr. Bird: We object to all this, the contract takes care of that.

The Court: The contract takes care [86] of nearly everything, but we have gone a long way here, I think he may answer.

A. Mr. Abegglen was to receive \$2,000.00 each time one of these mortgages was paid.

Q. Each time they received \$25,000.00?

A. Yes, sir.

Q. But not otherwise? A. Not otherwise.

Q. So the condition under which he was to get \$2,000.00 was the payment of \$25,000?

Mr. Bird: We object to that as calling for a conclusion.

The Court: Objection is sustained.

Mr. Worthwine: That is all.

JACK LEIGHTON

being called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Will you state your name?

A. Jack B. Leighton.

Q. Where do you live?

A. Moore, Idaho.

Q. Where did you live in 1948?

A. At the Cove Ranch at Gannett, Idaho. [87]

Q. (By Mr. Bird): This instrument is marked as Defendants' Exhibit No. 9, it was not offered.

Mr. Worthwine: I will offer it.

The Court: It may be admitted.

Mr. Bird: That is all I called this witness for, so he may be excused if it is agreeable.

The Court: Do you have any examination?

Mr. Worthwine: Yes.

Cross-Examination

By Mr. Worthwine:

Q. I notice in this exhibit——

The Court: Mr. Worthwine, I don't believe this witness testified to anything except to state his name, I guess there is nothing for you to cross-examine on.

Mr. Worthwine: Very well.

PERRY BURNHAM

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. You are one of the Defendants in this case?

A. Yes, sir.

Q. Were the proceeds from the sale of the grain from the Cove Ranch in 1948 transmitted to you? [88]

A. I received payment for all the grain.

Q. How much did you receive on account of the grain,—would the amount you gave when your deposition was taken be the correct amount?

A. I beg your pardon?

Q. Would the amount you gave several months ago when your deposition was taken be correct?

A. No, there is a little error in the net I received for the grain in 1928, it was \$11,774.11.

Q. You said 1928, I believe you must have meant 1948.

A. Yes, I beg your pardon.

Q. What amount was received from the cattle sold during that year?

A. The net receipts for the cattle was \$10,609.05.

Q. Did that take into consideration the shipment in December, 1948?

A. That was all the cattle that was sold with the exception,—yes, it was all the cattle or livestock that was sold.

Q. Mr. Burnham, let me ask you if you didn't give these answers in your deposition to the follow-

(Testimony of Perry Burnham.)

ing questions asked. "Q. Mr. Burnham, weren't about two truck loads of cattle taken to the market from this ranch in December, 1948, that are not reflected in the figures heretofore given, somewhere in the vicinity of \$3,000.00 worth?" and your answer was "In December?" "Q. About [89] December, it was the very latter part of the year?" and your answer, "Oh, that is right, there was a shipment of cows, 20 head, went to Twin Falls Stockgrowers." "Q. What date was that, what date were they taken, please?" And your answer: "They sold for \$3131.25." "Q. That was the net?" And your answer: "There was a little freight come off that; I will give you the net down below if you want it." Do you remember that?

A. I don't remember the exact figure but I have each shipment and the receipt of the people who sold it.

Q. Let me ask you if you didn't testify as follows: "Q. How much did they pay to you on account of the purchase price of the Cove Ranch?" And your answer: "They haven't paid anything but we sold some livestock and we sold some grain." "Q. And what did you receive from the livestock and the grain?" Answer: "From livestock the net receipts is \$10,740.07; from grain \$11,806.83." Now in addition to that——

A. ——There was a little error in the figuring.

Q. In addition to that didn't you testify that there was a December shipment of a little over \$3,000.00?

(Testimony of Perry Burnham.)

A. There were three shipments that amounted to more than \$3,000.00.

Q. What amounts were credited on the account of the Kraft Company?

A. How much did I pay Kraft? [90]

Q. How much was paid to the Kraft Company on the Kraft account from the proceeds of the ranch in 1948?

A. I don't know, I never figured it up.

Q. Calling your attention to Exhibit which has been marked as Plaintiff's Exhibit No. 13, does that refresh your recollection as to the amount?

A. It doesn't refresh my recollection at all, but I think Mr. Skeen has a paper that I received from Kraft with their report, but I don't remember what it is.

The Court: Can it be stipulated as to how much was paid on this account?

Mr. Worthwine: We will not object to exhibit 13 which relates to the Kraft account.

Mr. Bird: Can we consider it during the noon recess?

Mr. Worthwine: Yes, I will be glad to.

The Court: Then we will recess at this time, and we will convene at 1:30.

February 9, 1950, 1:30 P.M.

Mr. Bird: I asked counsel if we can agree that these are the correct amounts of grain and cattle sold.

Mr. Worthwine: Yes, we can agree to that.

(Testimony of Perry Burnham.)

Mr. Bird: These are, of course, in [91] addition to the taxes and water charges paid.

Mr. Worthwine: We can agree to those figures.

Mr. Bird: Then the Plaintiff rests.

PERRY BURNHAM

being called as a witness by the Defendants, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Worthwine:

Q. You live in Salt Lake City, Mr. Burnham?

A. Yes, sir.

Q. How old are you? A. Seventy-two.

Q. Where did you first meet Mr. Abegglen, the Plaintiff in this case?

A. I met him at Twin Falls, Idaho.

Q. He testified you called on him before that time at Hailey, what are the facts in regard to that?

A. I was driving the car, and Mr. Skeen and my brother was with me; we stopped in front of his office, and my brother and Mr. Skeen went into his office; I never met him, I never got out of the car.

Q. There is some testimony about a meeting at Twin Falls at which you and your brother and the Randells and Mr. Skeen and Mr. Abegglen attended, do you recall that? [92] A. Yes, sir.

Q. Which Randell was present at that time?

A. Rube Randell and Carl Randell.

Q. And Rube is which one?

A. He is the older brother.

(Testimony of Perry Burnham.)

Q. Was any agreement reached at that meeting?

A. No, sir.

Q. What resulted from that meeting, to refresh your memory, was someone to pay or put up \$25,000 cash?

A. We called at Cliff Leightons at the Cove Ranch in the forenoon of the same day and we drove to Abegglen's office and then down to Twin Falls; Mr. Leighton informed me that he had a prospective sale for the ranch at \$150,000 and would get a down payment of \$25,000.

Q. What happened at the meeting in Twin Falls?

A. Mr. Rube Randell said that he had changed his mind and would not make any payment and wasn't particularly interested.

Q. Did the meeting adjourn?

A. That's right.

Q. Was there any discussion at that time about taking mortgages?

A. There could not have been such a thing, there was only one man who represented any mortgage at all, or who could say anything about it.

Q. Handing you Plaintiff's Exhibit No. 2, an Agency Contract, [93] is that your signature on that instrument? A. I think it is.

Q. On the back side? A. Yes, sir.

Q. Where was that signed?

A. At Boise, Idaho.

Q. In both places? A. Yes, sir.

Q. Both parts of the instrument?

A. All the papers I signed was at Boise, Idaho.

(Testimony of Perry Burnham.)

Q. About the Twin Falls meeting, after that where did you next see the Randells and Mr. Abegglen?

A. We went home from Twin Falls.

Q. How did you happen to come back?

A. As I remember Mr. Jack Leighton called me by phone and advised that it was possible that the deal might be put over by the three younger Randell brothers.

Q. After that call what did you do?

A. I got a hold of Mr. Skeen and my brother and son Robert and we all came up.

Q. Where did you meet Mr. Abegglen?

A. In front of the post office at Eden, Idaho.

Q. At that time did you see any of the Randells?

A. Not right at that time, we drove from the post office over to Mike Randell's ranch and spent about 30 minutes or a little longer. [94]

Q. You looked over the ranch?

A. We looked over the ranch and in the meantime Mr. Abegglen had gotten on the phone and said we could have a meeting at Boise and he could have all the boys meet together at Boise.

Q. On that trip to the ranch did you have any discussion with Mr. Abegglen about the titles to the property?

A. Yes, when we arrived, or during the conversation at the Mike Randell ranch; inasmuch as Mike wasn't there I said to Abegglen, "What have you to offer us?" We were talking and I said: "What have you to offer us in lieu of a down payment of cash

(Testimony of Perry Burnham.)

that Rube Randell was going to put up?" And he said that the boys had plenty of security and that their ranches were worth from \$75,000 to \$90,000 in the clear.

Q. Did he tell you about mortgages at that time?

A. Not at that time, I don't think he ever mentioned any mortgages at any time.

Q. What did you do after you went to the Mike Randell ranch?

A. We went from there to Boise.

Q. Did you have a meeting here in Boise?

A. Yes, sir, we spent the night; we got there late in the afternoon and stayed over night, Mr. Jack Leighton, Mr. Abegglen, Earl Burnham and my son Robert went to visit the Carl Randell ranch and the Ed Randell ranch. Mr. Skeen stayed at the hotel. [95]

Q. Did you reach a conclusion at the meeting at the Boise Hotel, did you reach any agreement?

A. Yes, sir.

Q. And Mr. Skeen was to reduce that agreement to writing?

A. That's right.

Q. What was said about the title to the ranches in your presence by Mr. Abegglen at the Boise Hotel?

A. I don't just remember that.

Q. Did you hear Mr. Skeen ask him about the title?

A. Yes, sir, he asked if he could get the titles and stuff ready—talking about finishing up the papers and so forth. After the deal was consum-

(Testimony of Perry Burnham.)

mated Mr. Abegglen agreed to get all the necessary papers and forward them to Mr. Skeen so that the thing could be finished up.

Q. Did you hear Mr. Skeen ask Mr. Abegglen whether the Randells had clear title to the ranches?

Mr. Bird: We object to that as leading.

The Court: It is leading.

Q. Do you understand my question, Mr. Burnham—did you hear Mr. Skeen ask about the titles?

A. Yes, sir, if the titles were all right; Mr. Abegglen said they had from \$75,000 to \$90,000 in their property, in valuation, in the clear.

Q. Where did you go from that meeting—the next day? A. To Twin Falls. [96]

Q. The next day?

A. No, we first went to visit Mr. Carl Randell's ranch. Mr. Abegglen and Mr. Leighton could not get accommodations in Boise that night, and we were to meet them there, and he took us to the Carl Randell ranch.

Q. What kind of a ranch did Carl Randell have?

A. The land we saw was cultivated land and was a very fine piece of land and very well cropped. I never saw a finer patch of beets than I saw there.

Q. Did you know that he didn't have a deed to it? A. Certainly not.

Q. Had you relied on Mr. Abegglen's statement concerning the condition of his titles?

A. I relied on his statement or I would not have gone to look at the ranch.

(Testimony of Perry Burnham.)

Q. Regarding this commission agreement, would you have signed it with Mr. Abegglen if you had known the condition of the Carl Randell ranch?

A. No, I would not have considered anything.

Q. Then after the contract was signed, the buy and sell agreement was signed also at the Boise Hotel?

A. Which agreement?

Q. To sell the Cove Ranch, that was signed at the Boise Hotel?

A. That's right. [97]

Q. And you made a trip in August when the contract was modified?

A. Yes, sir.

Q. About the Cove Ranch?

A. Yes, sir.

Q. And that was a trip up to the Cove Ranch?

A. Yes, sir.

Q. Mr. Skeen was with you at that time?

A. Yes, sir.

Q. And at that time you took over the livestock?

A. That's right.

Q. In regard to the Kraft contract, what did you do when you sold the cows?

A. I purchased the Kraft equity in these cows that they had left with Mr. Leighton—fourteen hundred and some odd dollars—I had to do that before I could legally turn around and sell them.

Q. Did you hear what had happened to the ranch in the fall of 1948, about it being occupied or unoccupied?

A. Yes, sir.

Q. What did you find out?

A. I received a letter from Mr. Mike Randell about January 1st, 1949, that they had moved the re-

(Testimony of Perry Burnham.)

maining cattle to his ranch and were feeding them at Eden.

Q. What finally happened to them?

A. We turned them to the Randell boys. [98]

Q. And that was in the deal entered into in April? A. Yes, sir.

Q. How many head did you have?

A. 31 or 32 head, 26 at Mike's ranch and then three cows and some small calves at Carl's ranch.

Q. Now, why was it that you came to Twin Falls in May, 1949—at whose request?

A. Mr. Baldwin's.

Q. What took place at Twin Falls—there has been some testimony about a conference between—when you were present, your brother, Mr. Skeen, the Randells and Mr. Abegglen in the spring of 1949 at the time the contract was surrendered, do you remember that conference? A. I do.

Q. And what did you offer, did you make any offer to the Randells?

A. I told them that I would help them out financially if they would go back on the ranch.

Q. Did Mr. Abegglen attend that meeting?

A. He came after we had been in session for five or six hours, then he came, yes, sir.

Q. How long did he stay?

A. As I remember about two or three hours.

Q. Mr. Abegglen testified that you were demanding a payment of \$10,000 or else—will you state the facts? A. That is false, absolutely. [99]

Q. What offer did you make to the Randells at that time?

(Testimony of Perry Burnham.)

A. I offered to finance them in case they could not meet the payment in the spring, if they would go back—I never told them to get off—I never did anything in any shape or form to get them off the ranch except by their own choice.

Q. What reason did they give for not going back on the ranch?

A. They couldn't meet the payment and they asked us to make them some offer to let them go.

Q. And that is the time you turned over some 35 or 37 head of cattle to them?

A. That's right.

Q. Did one of the Randells give his reason as some illness in his family, that he couldn't go on with it?

A. Mr. Mike Randell said that he had an invalid mother and that he could not leave her, which was the reason and Carl said he would not go back except on a lease—if we would lease him the ranch; Ed said that he didn't want to go back if he could get some release or make some settlement, and Oreal Randell said about the same thing.

Q. He is the one that you referred to as Mike?

A. Yes, sir.

Q. Was it at their request that you entered into this cancellation agreement in the spring of 1949? [100]

Mr. Bird: We object to that as leading.

The Court: Perhaps it is a little leading, but you may go ahead.

A. They came to us in the morning after an all

(Testimony of Perry Burnham.)

day's session the day before and that was into the middle of the night—they came about 9:00 o'clock in the morning and said they had decided to quit, and they wanted to be released.

Q. The brothers had a session, had they gone off somewhere and consulted together?

A. They went home I guess, it was sometime between midnight and nine o'clock the next morning that they had this consultation. They returned and told us they were ready to quit.

Q. Which ones did the talking?

A. All three of them.

Q. Tell us as near as you can remember what they said?

A. As I remember Ed was the first one and he said: "We have decided that we cannot go on, I don't have the means and Mike cannot go because mother is ill and we don't think Carl"—or he might have said Carl wants to be relieved of his mortgage and so forth.

Q. He mentioned a mortgage?

A. He did.

Q. He is the one that didn't give a mortgage?

Mr. Bird: We object to that as leading. [101]

Mr. Worthwine: Maybe it is.

Q. They came to you at about nine o'clock and you entered into this agreement terminating the old contract?

A. Yes, sir.

Mr. Worthwine: You may cross-examine.

(Testimony of Perry Burnham.)

Cross-Examination

By Mr. Bird:

Q. You mentioned about this conference in May of 1949, you had reference to April, 1949, did you not, you had no conference in May of 1949?

A. Oh, yes.

Q. In May?

A. Let me see—I was thinking of April, I don't think we had a conference in May, I don't remember that we did.

Q. At this meeting Mr. Baldwin whom you mentioned, who was he?

A. He was a real estate man in Twin Falls.

Q. And what was his interest?

A. He had a customer to pay \$100,000.00.

Q. And you wanted to get rid of the Randells?

A. No, there would be \$40,000.00 more out of the Randell boys.

Q. You had received a substantial amount of payments from the sale of the grain and cattle?

A. Yes, sir.

Q. What was it Mr. Abegglen said about the securities on the three ranches of the Randell brothers?

A. The first was when we arrived at Oreal Randell's ranch at [102] Eden; when he didn't have a meeting of the boys set we couldn't get at anything, and I said, "What have you got that we can get in lieu of the \$25,000.00. We are not interested in anything except a good clean cash deal," and he said:

(Testimony of Perry Burnham.)

“These boys have got property in the clear to at least \$75,000 to \$90,000.”

Q. As you said a moment ago he said he had security to the extent of \$75,000 to \$90,000?

A. Well either way, I don't know how you want to say it, their interest clean of debt was worth \$75,000 to \$90,000.

Q. Then you knew there was some debts?

A. He hadn't told me.

Q. Did you hear that at the Boise Hotel conference; did you hear Mike say that he owed four or five thousand dollars? A. I did.

Q. That was the conference at which this contract was signed in May, 1948?

A. That's right.

Q. Did you at that conference also hear Carl Randell say that he was purchasing his ranch on a contract and that he considered his equity at \$25,000?

A. I never heard anything about the indebtedness, I thought his ranch was in the clear.

Q. How was your hearing at that time?

A. I don't think it was as bad as it is now. [103]

Q. Did you,—or could you hear a normal conversation? A. I could.

Q. Then it is a good deal worse now?

A. It is a little worse.

Q. Did you hear the three Randell brothers say that he owed something to the Reclamation Service? A. Yes, sir.

Q. And he presented a slip to show his indebtedness? A. I didn't know that.

(Testimony of Perry Burnham.)

Q. You knew there was an indebtedness?

A. I didn't know, but I understood from Ed Randell that he had a little indebtedness—there was a little indebtedness against that, and he had a ready sale of the ranch at that time for \$35,000.00.

Q. You knew that two of these Randell ranches were not clear when you made the contract in May, 1948?

A. That is my understanding.

Q. You don't remember Carl saying that he was buying his ranch under a contract?

A. I didn't know any such thing.

Q. That statement could have been made and because of the defect in your hearing you would not have heard it?

A. No, not so close by, especially when I was really following along in the deal.

Q. How close were you sitting to these witnesses in this trial, the several Randells, when they were on the stand? [104]

A. I guess about 12 or 15 feet away.

Q. Did you hear all of their testimony?

A. I didn't hear any of yours.

Q. Did I give any testimony?

A. You did a lot of talking, sometimes a little fast and a little low, and I didn't get all of it.

Q. You testified that Mr. Skeen instructed Mr. Abegglen to get these papers prepared?

A. Yes, sir.

Q. And who was he the lawyer for?

A. For myself and the two Leighton boys.

Q. What was Mr. Leighton's interest in the deal?

(Testimony of Perry Burnham.)

Mr. Worthwine: We object to that as immaterial.

The Court: It has been brought out here that there was some interest in the Leightons, he may answer.

A. I and my brother owned the ranch and made a price to the Leighton boys, and they got this offer, it was at a certain price and it appealed to them,—they are the boys that worked up this deal.

Q. What was that price?

Mr. Worthwine: We object to that as immaterial.

The Court: He may answer. [105]

A. The sale price was to be \$140,000.00.

The Court: Now, I cannot see where it is material, but you may go ahead.

Q. Under this contract, the original sale contract, between you and the Randells, they agreed to furnish you with certain securities?

A. That's right.

Q. On their ranches? A. Yes, sir.

Q. Mr. Skeen was your attorney in handling that matter?

A. He was attorney for the Leighton boys and ourselves.

Q. Didn't you instruct your attorney to go ahead and complete this contract and see that it was carried out?

A. Well, we relied on his judgment.

Q. Didn't you rely on him to get these securities in order? A. Yes, sir.

Q. And he took steps to that end?

A. He asked Mr. Abegglen to get the abstracts

(Testimony of Perry Burnham.)

and necessary papers together and get them to him and he would close the deal.

Q. It was Mr. Skeen's duty rather than Abegglen's under your understanding of the arrangement then?

A. Yes, sir, I think so, I didn't depend on Mr. Abegglen.

Mr. Worthwine: We object to all this as incompetent, irrelevant and immaterial, and it is a conclusion on a matter of law. [106]

The Court: That is right.

Q. Did you hear Ed and Mike Randell testify that they had leased their places for the season of 1949 preparatory to going on to the Cove Ranch and farming?

A. Yes, sir, I heard Ed say that he had made arrangements for his boys to go ahead and run his ranch.

Q. His boys?

A. His boys, he said he made arrangements with the boys to run the ranch.

Q. Did you hear him testify about that this morning?

A. Yes, sir.

Q. What did you hear him testify this morning?

A. That he leased the ranch,—something of the sort.

Mr. Worthwine: I object to that, he cannot ask this witness what the other witness has testified.

A. Yes, I heard him say that he leased it.

Q. Did he lease it to the boys?

A. I didn't hear him say who it was to.

(Testimony of Perry Burnham.)

Q. You heard Mike say he leased his ranch in preparation to going on the Cove Ranch?

A. I didn't pay much attention to them so I cannot say what he testified to.

Q. Your first contact with Mr. Abegglen, I believe you said you drove to his office but that you didn't go into the office? [107]

A. That's right.

Q. Did you see him at that time?

A. I don't remember seeing him at all, if I saw him it was through the window in his office.

Q. But you did approach his office?

A. Yes, I was the driver of the car.

Q. Your brother went in the office?

A. Yes, sir, my brother Earl and Mr. Skeen.

Q. You had fairly close contact with him through your brother and Mr. Skeen?

A. Not close enough to talk to him.

Q. You are sure that both portions of this commission contract was signed in Boise?

A. There is some question in my mind on this,—if there isn't a little bit of something wrong with that contract.

Q. What do you think is wrong with it?

A. In the first place when we agreed on an amount that Mr. Abegglen was to receive, as I remember he took a piece of paper and whether it was this or not,—but he wrote it in longhand, that is the kind of a piece of paper that I signed.

Q. Is that not your signature?

(Testimony of Perry Burnham.)

A. That looks like my signature all right but I have from my memory what I think took place.

Q. Was both sides of that contract signed at the same conference [108] in Boise on May the 24th, 1948?

A. I cannot remember signing, but I am sure that I didn't sign any contract at any other place except in Boise.

Q. How long were you in Boise?

A. We got there late in the afternoon and was there until the second day after,—after we returned from looking at the ranches we stayed the second night and left the second day and came to Twin Falls, Idaho.

Q. And all the signing was done on this commission contract during this period?

A. At different talks, all of that time.

Q. And it was signed before you left Boise?

A. Yes, sir, it was before I left Boise.

Q. On the back of the commission agreement which is Exhibit No. 2, it is dated May the 15th,—I may have stated the wrong date before,—it is dated May 15th?

A. I cannot account for that,—I cannot account for the sheet that I am sure was in longhand and that is now in printing,—that is the matter I am hazy on.

Q. Calling your attention to Exhibit No. 3, the contract made between you and your brother and the Randells on May 11, 1948, that is the first contract for the sale of the ranch, and it is provided

(Testimony of Perry Burnham.)

in the original contract that the buyers agree to pay \$140,000.00, \$70,000.00 on [109] or before two years, and \$70,000.00 in six annual installments beginning on May the 15th, 1949, do you consider and understand that is the correct date?

A. According to that agreement.

Q. The first installment becoming due before the major payment of the \$50,000.00?

A. My understanding was that there was one installment.

Q. Due before the balance of the \$70,000.00?

A. That is as I remember, that is right, but I would have to check in there,—I am just a little hazy on that.

Q. Now on this paragraph that I show you, do you know whose handwriting that is, this short paragraph in writing in longhand?

A. Some of the letters look like some of mine, and some are absolutely not mine; I never made a "D" in my life that looks like that, I don't know whose it is.

Q. I am not intimating that it is yours, Mr. Burnham, you say that at this meeting in Twin Falls, Mr. Abegglen was there for several hours?

A. That is which meeting?

Q. This last meeting when you agreed to cancel the deal, how long was Mr. Abegglen there?

A. I don't know, he came after we had been in session with the Randell boys for several hours. He stayed in the room with us and overheard the talking,—he did some talking too and then he disap-

(Testimony of Perry Burnham.)

peared, I don't know whether [110] he stayed there or where he went.

Q. He wasn't in the meeting when you had the final agreement? A. That I don't remember.

Mr. Bird: That is all.

Redirect Examination

By Mr. Worthwine:

Q. When did you find out first in the spring of 1949 that Ed Randell and Mike Randell had leased their ranches?

A. Ed told me that at the meeting,—our meeting in trying to negotiate a deal,—I don't just recall Mike's statement but I still have a faint recollection that Mike had made an arrangement with the man that he had hired and was working with him on the ranch prior to that time.

Mr. Worthwine: I think that is all.

The Court: Did you say anything to Mr. Abegglen about his commission at the time he was present when you negotiated taking back the ranch?

A. Yes, sir.

Q. What did you say to him about it?

A. An argument came up instead of their paying \$150,000.00 for the ranch it was reduced to \$140,000.00, and my brother and I and Mr. Abegglen decided it was a pretty stiff commission, and we didn't think we would go through with the deal and pay that commission; he put the deal through and he agreed to cut \$1,000.00. [111]

(Testimony of Perry Burnham.)

The Court: When you took the ranch back, at the time you made the deal to have the ranch returned to you, when Mr. Abegglen was there, was anything said about his commission at that time?

A. I don't remember that there was.

The Court: He never said anything to you about that?

A. No, sir.

The Court: There wasn't any question of the commission raised at all?

A. No, sir, not that I know.

The Court: You didn't feel that it was necessary to have the commission settled at the time you settled the deal with the Randells?

A. That's right, I didn't think he had any commission coming, we were taking back our own property.

The Court: That is all I have.

Mr. Worthwine: Nothing further.

Mr. Bird: That is all.

J. D. SKEEN

being called as a witness by the Defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Worthwine:

Q. Are you a practicing attorney?

A. Yes, sir. [112]

Q. Where do you live?

A. Salt Lake City, Utah.

(Testimony of J. D. Skeen.)

Q. For the purpose of the record, you are the J. D. Skeen that signed the pleadings in this case?

A. Yes, sir.

Q. How long have you practiced law?

A. Since 1902.

Q. When did you first meet Mr. Abegglen, the Plaintiff in this action?

A. I think it was the latter part of April, 1948.

Q. That has been testified to by Mr. Burham as the time when he drove the car?

A. That is the occasion.

Q. When did you next see him?

A. I saw him the same evening, I talked with him briefly; we went to Twin Falls and I saw him the same evening at Rube Randell's place.

Q. Was he present at the conference in Twin Falls that evening?

A. Yes, sir, he was there.

Q. Who else was present?

A. The two Burnhams, Mr. Abegglen, Rube Randell, Carl Randell and his wife, and Mrs. Rube Randell and myself.

Q. What was the subject-matter that was discussed at that time?

A. Well, they discussed a proposed sale of the Cove Ranch to the Randell brothers. [113]

Q. Which ones of the Randell brothers?

A. I hadn't met Mike or Ed at that time; I didn't take any active part in what was said,—in their conversation,—they talked off in a little alcove of the residence. I visited mostly with the two ladies.

(Testimony of J. D. Skeen.)

Q. Did you start to draw an agreement?

A. Yes, sir, they came to the room,—

Q. —Whom do you mean?

A. Mr. Burnham and one of the Randells, they had come to some agreement as to the price. The Burnhams had agreed to reduce it to \$140,000.00 and Mr. Abegglen started to take the contract under my dictation; someone said that Rube refused to put up the \$25,000.00 and that ended the conference.

Q. Was anything said about taking any mortgages?

A. Nothing at all, other than the Cove Ranch.

Q. When did you next come to Idaho?

A. I came from Salt Lake City with the two Burnhams,—I think we left early on the morning of the 11th of May and we stopped at Eden and then came down to the Oreal Randell ranch and remained there for about an hour or an hour and a half I should judge.

Q. And then you came to Boise?

A. Yes, sir, we came to Boise.

Q. During the time you were at Boise did you ask Mr. Abegglen anything about the title? [114]

A. I don't know that I personally asked the direct question, but the discussion went on up in the room at the Boise Hotel. They arrived at the terms of the agreement and I was asked to reduce their agreement to writing, and in connection with it the matter of titles was talked of by the various people in the conversation.

Q. What did Mr. Abegglen say?

(Testimony of J. D. Skeen.)

A. Mr. Abegglen stated at different times that they had three ranches; I don't recall whether he said there were any encumbrances on any of them, but I learned that there was on Mike's a mortgage to the Federal Land Bank of Spokane and the title, so far as I knew or of anything said there, was clear in Carl Randell and Ed Randell.

Q. I didn't get the last part of that answer, Mr. Skeen?

A. So far as I knew from anything that was said there the title was clear in Carl Randell and Ed Randell, there was no mention of mortgages made with respect to either of those ranches.

Q. Did you have any knowledge gained from anyone or anywhere that the Carl Randell ranch was encumbered,—strike that, please, Mr. Reporter,—let me ask you this, did you have any knowledge at that time that had been gained from anyone or from any place that Carl Randell didn't have title to his ranch?

A. No, I didn't know. I didn't know it was being bought on a [115] contract until it was stated here yesterday.

Q. You did later make a search of the records and couldn't find anything on it?

A. On the morning of the 29th of June I made, or had a search of the records made, and reported to me, and then I learned that Carl Randell didn't have any property in his name on record.

Q. After the meeting in the Boise Hotel, what time did that meeting end?

(Testimony of J. D. Skeen.)

A. What time of day?

Q. Yes, the first meeting?

A. The first appointment was about 9:00 o'clock in the evening and it continued until 12:00 or 1:00 o'clock in the morning.

Q. Now go ahead and tell what happened?

A. At the conference in the evening the details of the contract were worked out; the three Randells were to give mortgages on the respective ranches, the one at New Plymouth, the one at Parma, and the Oreal place, to secure the notes to be given by each of them for \$25,000.00; the terms of payment were agreed upon and they requested me to draw a contract embodying the terms of the agreement in the morning. I proceeded to draw the contract and that was on the morning of the 11th or 12th, I think it was the [116] morning of the 12th.

Q. Did they return to execute it?

A. Yes, sir, the Burnhams and the Randells and the Randells' wives,—two of them returned about 2:00 o'clock in the afternoon on the 12th of May to the hotel and we had lunch and then went up to the room and I read the contract through very carefully, and then I explained every phase of it to them, particularly with respect to the mortgages that were to be given, and the fact that the contract was not to take effect until the mortgages were given. Questions were asked and we discussed the matter, after which they all signed the contract without much further discussion.

(Testimony of J. D. Skeen.)

Q. Counsel for the Plaintiff called the attention of Mr. Burnham regarding the first payment on that contract, can you turn to that paragraph?

A. Yes, sir.

Q. Concerning the payments to be made in 1949?

A. Yes, I have it here. The payments were to be made as follows: "The buyers are to secure payment of the \$70,000.00 payable on or before two years from date hereof with three,"—that is not the paragraph I had in mind, I am sorry. The payments were to be made in accordance with this paragraph: "The buyers agree to pay for said property the sum of \$140,000.00 as follows: [117] \$70,000.00 on or before two years from the date hereof, and \$70,000.00 in six equal annual installments beginning May 15, 1949."

Q. Counsel seemed to think there was something wrong, was that the agreement?

A. That was the agreement.

Q. And why was it that some annual payments were to be paid before the \$70,000.00, if there was?

A. The Randells proposed to sell their ranches and to make the payments,—Mike had an offer of \$35,000.00 and was holding for \$38,000.00. They proposed to sell and immediately make these payments.

Q. Well, Mr. Skeen, if you had known or had any knowledge that Carl Randell didn't have title to his property would you have advised the Burnhams not to deal with them?

(Testimony of J. D. Skeen.)

Mr. Bird: We object to that as incompetent, irrelevant and immaterial.

The Court: I think it is immaterial but I will permit him to answer. It seems to me this later agreement takes care of this, but he may answer now.

A. No, I would not, and I would not have drawn any agreement or contract.

Q. Would you have advised them to enter into a commission agreement?

A. No, I would not, because I would have advised them no contract [118] could be made such as this.

Q. Where did you first see that commission agreement that is in evidence here?

A. It was presented to me right after or at the time, almost simultaneously with this contract of sale.

Q. Was it at Twin Falls?

A. No,—I saw no commission agreement except the one signed by C. B. Leighton at Hailey, but none signed by the Burnhams.

Q. Referring to the Boise meeting, after the contract was signed, what did you do, if anything, in regard to having the mortgages executed?

A. I immediately upon the signing, I addressed myself to Mr. Abegglen and said: "You can get the description of this property, get the titles run down, the land deeded to the different Randells and send it to me in Salt Lake City, I am leaving and will be in my office at noon, and I can get these made the following day." He said: "Why don't you get

(Testimony of J. D. Skeen.)

the description and do it now," and I said: "No, you can get the descriptions,—you would not be entitled to a contract until you get the mortgages signed." And he indicated that he would do that, and we left after that discussion as to how the descriptions would be gotten to me and the mortgages made. [119]

Q. You never did get the description of the Carl Randell place?

A. No, sir, Mike Randell had the tax receipt with the description on his property, and sometime later Ed Randell sent down the deed to his property, but Carl Randell sent nothing, and shortly after that within a course of a few days I started to communicate with him and I called him by telephone, and I came up and Carl was there in the small house. I don't know whether he had moved in, his wife was there and I presented him with the mortgage and the note, and he and his wife signed the note, and he didn't have the description of the land but he signed the note and promised to complete the mortgage and send it to me in a few days. He failed to do so; I never got any mortgage from him, and on the 28th of June I came up to find out what could be done to straighten it out, and then for the first time I found that Carl had no title to any land in New Plymouth or any other place that I could find.

Q. Do you recall a meeting in Twin Falls in April, 1949? A. Very distinctly, yes, sir.

Q. Where did that meeting take place?

(Testimony of J. D. Skeen.)

A. In the Park Hotel.

Q. And who was present? [120]

A. Perry Burnham and Earl Burnham, Robert Burnham a part of the time, and the three Randells, Ed, Mike and Carl and the wives of Ed and Carl at least on the second day; I don't know that they were there on the first day, and Mr. Abegglen was there for an hour or so on the evening of Saturday, that was the 3rd of April; then the three Randells that I have named and the wives of the two that I mentioned were there Sunday morning.

Q. And were you present at a conservation there, if so, what was said by the Burnhams to the Randells?

A. Of course, the conversation lasted a good many hours; the substance of the conversation between Perry Burnham and the Randells, Ed and Mike, was that he was desirous of having them go back on the ranch and continue with their contract; that he would help them in stocking up the ranch and working it out if they two would cooperate and go on the ranch and take care of it.

Q. Did either of the Burnhams say anything about advancing money?

A. Yes, sir, Perry said he would advance money to help them out.

Q. Mr. Abegglen testified that the Burnhams were demanding or requiring a payment of \$10,000.00 there,—did you hear any demand for \$10,000.00 cash?

A. There was no such statement made by Mr.

(Testimony of J. D. Skeen.)

Burnham, I am sure that it was not. I do know about a \$10,000.00 and it is [121] the \$10,000.00 that Mr. Abegglen had in mind I am sure, but it was not a payment of \$10,000.00. It was an application for a loan on the ranch that was pending. A conference was had with Mr. Heise and two of the appraisers of the Prudential Life Insurance Company with respect to the loan,—a loan to the Randells on the property, and the loan it seemed after the property was appraised was approved as to the value of the property, but the question was raised as to them having a sufficient interest in the property to justify the loan. Mr. Ed and Mr. Mike Randell were trying to figure out a way to increase their equity in the property so that the loan could go through. In connection with this Ed proposed the selling of his farm for \$15,000.00, paying his mortgage and paying the real estate commission that he had there of some \$15,000.00, and there would be about \$6,000.00, approximately \$6,000.00 out of which the real estate dealers could be paid in cash and a mortgage could be carried on the balance, and he asked me to take it up with Mr. Burnham and Mr. Burnham said that he would release the mortgage and take a contract of sale to Ed's ranch to help them work it out, and I think that is the \$10,000.00 that was referred to by Mr. Abegglen. [122]

Q. How did you know,—strike that, please,—how did Mr. Burnham come to go to Twin Falls in April, 1949?

A. Yes, I know, Mr. Mike Randell talked to me

(Testimony of J. D. Skeen.)

over the telephone and my recollection is that he called me at my office at about 11:00 o'clock one day and he said that he was having a rather serious time at home and that they could not go on before communicating with Mr. Burnham,—that was the beginning of the trip up here to work up some kind of a settlement with them. I don't remember whether I came up with them the first trip or the second trip, at which the meeting was at the Park Hotel in Twin Falls.

The Court: We will recess at this time for 15 minutes.

February 9, 1950, 3:00 o'Clock P.M.

Q. Referring to the meeting in August 1948 at which time the contract was modified, did you at that conference,—that was at the Cove Ranch I believe? A. Yes, sir.

Q. Did Mr. Abegglen come to that meeting?

A. It was not exactly a meeting, the Burnhams were there and the Randells and we just talked around at different places on the ranch there; Mr. Abegglen was there for a short time.

Q. One of the witnesses testified,—I believe it was Mr. [123] Cliff Leighton that testified after the meeting in 1948 in Twin Falls you telephoned him?

A. If you have reference to the statement made that the mortgages were taken and were good and for him to surrender possession, yes, I heard that.

Q. Did you put in such a call to Cliff Leighton at that time?

(Testimony of J. D. Skeen.)

A. No, I didn't say that the mortgages were taken, I didn't tell anyone that because they were not taken,—one was not taken.

Q. Was the mortgage or mortgages discussed?

A. I told him about the mortgages and that they would be good when we took them but we didn't have one of them.

Q. At the Twin Falls meeting,—first, when this meeting was had Rube Randell was present?

A. Yes.

Q. And no mortgages were mentioned at all there.

Q. Immediately following that meeting did you call Mr. Cliff Leighton and talk about mortgages?

A. No, I don't think so; I had no conversation with respect to mortgages at that meeting, but after the one here in Boise, I talked about the mortgages, we were talking with him.

Q. Did you have a discussion at the April meeting with Mr. Abegglen in 1949? [124]

A. I did.

Q. Tell us what that was.

A. Well, he came up to me in the upper balcony in the Park Hotel and he said that the Burnhams were not treating the Randells right; they had no business calling on them to pay \$10,000.00, and I said: "They are not calling on them to pay \$10,000.00, they are trying to get them to go back on the place." And he said that they demanded too much, and I said they were compelled to do something, and they came down to work out some kind of a

(Testimony of J. D. Skeen.)

settlement and we would like his cooperation; that he had got us into it and we had to clean it up and we wanted his cooperation, and he refused to participate in any sense to help us and he left.

Q. Was there anything said about the commission?

A. I tried to talk to him about the commission but he wouldn't talk; all he would say was that a contract is a contract; that is all he would say.

Mr. Worthwine: You may examine.

Cross-Examination

By Mr. Bird:

Q. Mr. Abegglen refused to participate in that conversation of April the 4th.

A. Yes, sir, he refused to participate or discuss it.

Q. Did you hear Mr. Burnham testify that he sat there for two or three hours in that [125] conference?

A. Will you repeat that question?

Q. Did you hear Mr. Burnham testify that he was at the conference for two or three hours?

A. I understood Mr. Burnham to say that he was around there for two or three hours,—there was no conference, they were just assembled there in a conversation.

Q. Mr. Abegglen was just in the hotel, he had not and did not participate in that meeting?

A. He came around the hotel and sat around for

(Testimony of J. D. Skeen.)

sometime; I wouldn't say for two or three hours. I tried to talk to him but I wasn't able to though, I don't think he participated in that conversation.

Q. Did he participate other than in his talk with you?

A. I don't know whether he talked with Burnham or not; they were down the balcony there and I know we didn't sit around a table and have any discussion.

Q. Did you accompany Mr. Burnham to Hailey?

A. I was there with the Burnham brothers.

Q. They drove to Abegglen's office?

A. Yes, sir.

Q. Did you get out of the car?

A. I went in and had a talk with Mr. Abegglen.

Q. Did Mr. Burnham get out?

A. I don't think that Perry got out, he had a little difficulty in getting around,—I think Earl got out and was standing [126] around during the conversation with Mr. Abegglen.

Q. Did Mr. Abegglen come out when you departed?

A. I don't think so, I asked him to let me see the Leighton listing of the property and he let me look at it.

Q. I understand you to say in the early part of your testimony that you didn't know that Mr. Carl Randell only had a contract on his farm until this matter came up in this court room?

A. That is true, I never heard it from anybody; I talked with Carl, Mr. Abegglen and with Mike,

(Testimony of J. D. Skeen.)

and in the discussion in the Boise Hotel no one ever suggested for a moment that Carl's interest rested upon a contract. On the contrary, they did state that it rested upon a deed, and I drew the mortgage on deeded property.

Q. You didn't know that about Carl's ranch until this trial?

A. I suspected it, but I never knew,—I drove down to Parma and tried to find out where Carl's place was and I called the abstract company and had a report that,——

Q. You are the J. D. Skeen whose name appears as attorney in the answer to the amended complaint?

A. In the answer, yes, I am.

Q. Let me read from this page 5,—paragraph Two beginning on the sixth line: "The Plaintiff and the said Randells failed and neglected to furnish the said record, and thereafter, on or about the 30th of June, 1948, Defendants [127] procured such records, and then found that the said Carl Randell was not the owner of the farm exhibited to the Defendants, or any farm whatever."

A. I just said that I went down and found there was no farm in Carl Randell's name in New Plymouth that I could find.

Q. Then you knew it before you came to this trial?

A. I didn't know then that it rested upon a contract, I saw that the legal title, so far as the abstract reported, was not in Carl Randell's name, and I

(Testimony of J. D. Skeen.)

could find no property in his name; as to how he was in possession as a tenant or a contract purchaser, I didn't know until yesterday.

Q. Were you familiar with the dealings being had at the time they applied for a loan,—at the time the Randell's applied for a loan?

A. You mean familiar with their property?

Q. The application for a loan?

A. I never saw the application.

Q. Do you know why they didn't get the loan?

A. I only know that I attended a conference in Mr. Heise's office in Jerome with Mr. Heise and the appraisers, and the reason that they couldn't make the loan was that the Randells' equity in the property was not [128] sufficient for them to accept the loan,——

Q. ——Did they say anything about so much litigation involving the Cove Ranch?

A. I didn't hear that question, Mr. Bird.

Q. Was the complaint made in connection with the application for the loan on the ground that litigation was pending involving the Cove Ranch?

A. I don't recall any specific reference to that in the conversation, but I called their attention to the fact that Stewart had a contract of sale to Leighton, and there was a suit pending, and I said that Mr. Burnham would put up a bond to protect the title,—it was mentioned.

Q. With reference to the conference in Boise was Leighton present?

A. In reference to the conference where?

(Testimony of J. D. Skeen.)

Q. In Boise.

A. Jack Leighton was there, C. B. Leighton was not.

Q. Mr. Abegglen was supposed to get these descriptions and the abstracts and send them to you?

A. There was a perfect understanding of that.

Q. Did you get the abstract on the property?

A. Not until the 29th of June. [129]

Q. Did Mr. Abegglen send you those?

A. He sent me nothing, we got the tax notice from Mike containing the description of his; I got the deed from Ed to Ed Randell's property from which I made the mortgage.

Q. Had these Randell boys been requested to send these instruments to you?

A. Only in this way, that I wrote the contract, and when I said we must have this title run from the last conveyance to the Randells immediately because the contract could not be put into effect until I had the mortgages.

Q. Then the Randells were requested to furnish them?

A. No, I said to the group of them: "Perhaps you boys are not familiar with the record, and Mr. Abegglen is, he can get this and send it to me at once." That is the understanding we had when I left.

The Court: How did you get the description to fill in?

A. The description of Mike Randell's from the tax receipt that he sent, and the description to Ed Randell's from two deeds that he sent to me later,

(Testimony of J. D. Skeen.)

and I never got the description of the land that Carl Randell was on.

Q. At the conference on April 4th, 1949, in Twin Falls, who else was there besides the Burnhams and the Randells, [130] yourself and Mr. Abegglen?

A. I presume you have reference to Mr. Baldwin, I saw him, that was the first time I ever met him. He was there a few minutes and left, and then I saw him again on Sunday about noon, the second day we were there. He and the ones I mentioned are all that I recall being there at any time that had anything to do with this. Later on Sunday Mr. Baird, a prospective purchaser, after the Randell settlement was made, and his son-in-law, Mr. Bartlett and Mrs. Bartlett came to the hotel and we talked to them.

Q. You talked to these other gentlemen about a sale of the ranch when the Randells could be gotten off?

A. I talked to Mr. Baird and Bartlett and I dictated a tentative contract to Mr. Baird's daughter in the morning. I talked to Mr. Baldwin a few words over the phone, although he came down on Sunday.

Q. Burnhams had a live prospect if and when they got rid of Randells?

A. That is kind of a restricted term—there was a chance to sell the property—there was a chance to sell it to Baird and Bartlett, it was off and on. I contract of sale was made the following Monday.

Q. Did that contract call for a substantial amount of cash? [131]

(Testimony of J. D. Skeen.)

A. I think my memory is good on that, it called for a cash payment of \$5,000.00, \$10,000.00 in ninety days, a substantial payment in December; the consideration was \$100,000.00.

Q. Were those gentlemen, Baird and Baldwin, there before the signing of the contract with Randells?

A. Baldwin was there for a moment on Saturday morning.

Q. What day of the month was that?

A. That was the 2nd of April. He left—he phoned me personally while we were eating breakfast the following morning about 9:00 or 9:30 and wanted to know if they had made settlement with the Randells and if it was all off. I told him that the settlement had not been made, but that the Randells had reported that they could not go on, and he said that if there was a chance to buy the ranch they would drive down.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

The Court: Where are those two \$25,000.00 mortgages now.

A. The mortgages are here in court.

The Court: In whose possession?

A. They have been in my possession, I brought them into Court.

The Court: They are in your possession for your clients?

A. I think I am their lawyer. It was provided

(Testimony of J. D. Skeen.)

that Randells [132] should take the cattle for \$6,000.00 interest on or before April 1st, at which time the mortgage would be cancelled of record.

The Court: Do you have any way to determine the value of those two \$25,000 mortgages?

A. Yes sir, indirectly, Mr. Randell—Ed Randell had his property appraised, so he reported to me, at \$15,000.00 subject to a mortgage for \$4,000.00 or a little over.

The Court: And the other one?

A. I don't know, I have always refrained from putting a valuation on that.

The Court: That is all I have.

ROBERT BURNHAM

being called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Worthwine:

Q. You are Robert Burnham?

A. Yes, sir.

Q. Where do you live?

A. Salt Lake City, Utah.

Q. You are the son of one of the Defendants?

A. Yes, sir, Perry Burnham.

Q. When did you first meet Mr. Abegglen? [133]

A. As I recall it was the 11th day of May, 1948, in front of the Eden post office.

(Testimony of Robert Burnham.)

Q. Did you accompany your father and your uncle and Mr. Abegglen to the Randell ranch at Eden? A. Yes, sir.

Q. Did you hear Mr. Abegglen make any statement at that time concerning the ranches that were being proposed as security, did he make any statement as to the value and condition of the title?

A. Yes, sir.

Q. Where and who was present?

A. After we were there a short period of time and it wasn't made absolutely clear what Randell had to offer, my father grew impatient and went to his car and he said: "If they don't have something in the nature of a clear title, we just as well go home."

Q. To whom did he say that?

A. Mr. Abegglen.

Q. What did he say?

A. He came over to the car and said: "These men do have a clear title in the ranch from \$75,000 to \$90,000."

Q. Did he say anything about the title?

A. Those are the words that I remember.

Q. Did you accompany your father and your uncle to Boise at that time? A. Yes, sir. [134]

Q. Were you present at the meeting in the Boise Hotel? A. Yes, sir.

Q. And Mr. Abegglen was present.

A. That is correct.

Q. What happened, what conversation or state-

(Testimony of Robert Burnham.)

ment did you hear Mr. Abegglen make concerning the property of the Randells?

A. As I recall at that meeting in the presence of the Randell brothers and the two Mrs. Randells, and the others, in answer to Mr. Skeen, he said that they did have this clear title interest from \$75,000 to \$90,000, that is my memory.

Q. Did you accompany any one the next day to visit certain ranches? A. Yes, sir.

Q. With whom did you go?

A. My father and my uncle.

Q. Where did you go?

A. We went to New Plymouth where we were to meet Mr. Abegglen and Jack Leighton.

Q. And were you shown a ranch?

A. Following our meeting at New Plymouth we drove out to Carl Randell's ranch in a northeasterly direction from town across a creek.

Q. Was it called the Carl Randell ranch? [135]

A. Mr. Abegglen said this is Carl's ranch, and when we were walking out to the beet patch, I asked Mr. Abegglen: "Is this Carl's ranch?" And he said: "Yes." I said: "Has he good title to it?" and he said: "Yes."

Q. Were you present at the time the August agreement was entered into at the Cove Ranch?

A. I was in and around there, there were several discussions around the property.

Q. Did you see Mr. Abegglen?

A. My memory says that he drove up there.

(Testimony of Robert Burnham.)

Q. Do you recall anything that Mr. Abegglen said?

A. As I recall he came out, and his attitude seemed to be that he was slightly upset to be requested to come up there—in substance he said he was upset, and he didn't like to come out and waste his time and gas, and that he didn't have any interest there, and shortly he turned around and left and I suppose he went back home.

Q. Did you make a visit to the Mike Randell ranch in Eden in 1949? A. Yes, sir.

Q. What was the purpose of that visit?

A. As I recall the purpose of that was that there had been a previous communication between Mike and my father, one of which was a letter where he stated the amount of cattle that he had there. [136]

Mr. Bird: Do you have the letter?

A. I don't have it.

Mr. Bird: We object to this, the letter would be the best evidence.

The Court: Yes, that is true.

Q. That was from Mike Randell?

A. Yes, sir.

Q. Whose cattle were they?

A. My father's.

Q. Who did you see on this trip, what ones of the Randell brothers?

A. The ones I remember at that meeting in March was my father and Mike and I. Jack Randell was there too as I recall.

(Testimony of Robert Burnham.)

Q. Was anything said on that occasion about the Randells leaving the ranch or surrendering the contract?

A. As a matter of fact it was stated to my memory.

Q. By whom?

A. Obviously it must have been Mike Randell, he is the one that stands out in my memory—they anticipated there would be some difficulty in carrying out the terms of the contract and they wished us to consider releasing them under those terms.

Q. What did your father tell Mr. Mike Randell when he made the [137] suggestion that they might have difficulty?

A. It caused considerable apprehension.

Mr. Bird: We object to that as a voluntary statement.

The Court: Yes, it may be stricken, you may state just what was said.

Q. What did your father say?

A. He encouraged them all that he could.

Mr. Bird: I move to strike that as not responsive and being a conclusion of the witness.

The Court: It may be stricken.

Q. What did your father say?

A. The exact word? No, I cannot give them.

Q. The substance?

A. In substance he said: "We would like you to go ahead with the contract."

Q. You knew at that time, or was there anything

(Testimony of Robert Burnham.)

said at that time about anybody being on the Cove Ranch?

A. There was, and my knowledge is no one was on there.

Q. You were not present at the meeting in April, 1949?

A. I was there in person but I don't suppose I took part in any of the conversation or conference.

Q. Did you hear anything said by your father or uncle, that they had to dig up \$10,000.00? [138]

A. I don't recall that.

Q. Was your father the spokesman or did your uncle take part in that?

A. I think both took part—I know of one instance they were sitting on the mezzanine floor on a three-cushion affair, Mike Randell was on one side and Ed Randell on the other, and they were there over an hour and I know Dad encouraged them to go ahead.

Q. Do you recall the substance of what he said?

A. Yes, he said, "We would much prefer your going ahead rather than giving it up."

Q. Did you hear anything said about advancing money, did you hear any such statement?

A. Hazily I do remember it, yes, sir.

Q. What was it your father said at that time, if it was your father?

A. My father at one time said that if they had difficulty in going ahead with the contract that he would advance them some money, I remember particularly for livestock.

(Testimony of Robert Burnham.)

Q. Do you recall the substance of what Mr. Randell said as to why they didn't want to go on?

A. The following morning they came, Ed and Mike—Mike appeared first and he said they had talked it over after they left the meeting—I suppose early in the morning [139] or before they got there—that was about 9:00 o'clock; that they decided not to go ahead with the contract and wished to be released.

Q. Did you visit the Cove Ranch later that spring? A. In 1949?

Q. Yes. A. Yes, sir.

Q. What time of the year was that?

A. As I recall it was some few days later, within a week, as a matter of fact, it was right after this meeting.

Q. What did you notice about the condition of the buildings, and equipment and the property?

A. The sheds had been caved in, the dairy barn had been caved in.

Q. What was the cause of that?

A. I suppose it was the weight of the snow, that was told to me.

Q. Did you notice any of the equipment?

A. One of the sheds where the roof had caved in was where one of the tractors was.

Q. Did you observe anything else?

A. Yes, we went into the house and I noticed most of the wiring that was visible was torn out of

(Testimony of Robert Burnham.)

the house, and where the plumbing had gone into the kitchen, a short piece of pipe was attached to it and run outside, and [140] the water was allowed to run, and in that way the house wasn't very clean—the doors were open, they were shut but they were not locked.

Q. Where was the hay chopper and the other equipment, the tractors—I believe you said one was in the shed? A. Yes, sir.

Q. Had the equipment been gathered up and placed in the sheds?

A. Some of it and some had not—there were two groups of machinery.

Q. All right, go ahead and tell us.

A. The hay chopper was down at his place, it belonged to Carl Randell, and the tractor was an Allis-Chalmers, that was included in the inventory.

Q. And where was that?

A. That was in the shed that had fallen down.

Q. There was a caterpillar?

A. No, that belonged to the Randells.

Q. And a tractor? A. Yes.

Q. Where was that?

A. That was outside.

Mr. Worthwine: I think you may inquire.

Cross-Examination

By Mr. Bird:

Q. The winter of 1948-1949 was a phenomenally severe one? [141]

A. In some localities.

(Testimony of Robert Burnham.)

Q. At the Cove Ranch?

A. I understand their water supply was one of the dryest.

Q. The severeness of the winter, not the water supply?

A. I was never there except in the spring, I don't know.

Q. You were at the conference in the Boise Hotel in 1948, on May the 11th and 12th?

A. Yes, sir.

Q. Did you hear most of the talk that was going on? A. I think I heard most of it.

Q. Did you see one of the Randells, Ed, I think, present to the group a slip of paper from the Reclamation Service showing the status of his obligation to that Department?

A. That is not in my memory.

Q. I suppose that you didn't hear Mike say that there was a \$4,000.00 loan on his property?

A. That was brought to my attention at that meeting.

Q. Did you hear him make that statement at that meeting? A. Yes, sir.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

EARL BURNHAM

being called as a witness by the Defendants, after being first duly sworn, testifies as follows: [142]

Direct Examination

By Mr. Worthwine:

Q. Will you state your name?

A. L. Earl Burnham.

Q. You are one of the Defendants in this action?

A. Yes, sir.

Q. Where do you live?

A. Bountiful, Utah.

Q. Your occupation or profession?

A. At the present time I haven't any in particular.

Q. Handing you Defendants' Exhibit No. 16, will you state what that is?

A. That is a check made out by myself to Jack Leighton.

Q. Are you familiar with Mr. Abegglen's signature? A. Well, no, I am not.

Q. Do you know why you drew that check?

A. Yes, sir, my brother got notice through Jack Leighton that there was a bill of \$500.00 due on a watering box or weir to the Irrigation Company that sends the water to the Cove Ranch.

Mr. Worthwine: We offer in evidence Exhibit No. 16.

Mr. Bird: The only objection we have is that it has no bearing on this matter whatever.

The Court: I will admit it subject to the objec-

(Testimony of Earl Burnham.)

tion and give it such weight as it is entitled to. [143]

Mr. Worthwine: This is a check for \$400.00 to Jack Leighton, endorsed by Jack Leighton, and Harold Abegglen.

Q. Mr. Burnham, you met Mr. Abegglen at Hailey in his office as has been testified to here?

A. Yes, sir.

Q. Where did you go from Hailey on that trip?

A. We went down to Rube Randell's home.

Q. Who was present at that meeting at Rube Randell's home?

A. Rube Randell, his wife, Mr. Skeen, myself and Mr. Abegglen.

Q. At that meeting what was the subject matter of the discussion?

A. Well, we discussed the possibility of a sale of the Cove Ranch.

Q. Was any agreement reached at that meeting?

A. No, sir.

Q. When next did you meet Mr. Abegglen?

A. At Eden.

Q. What time of the year was that?

A. That would be along in August—that was in May, 1948.

Q. Did you hear the question of the title discussed by Mr. Abegglen or in his presence?

A. I did at Mike Randell's ranch.

Q. Will you state the substance of the conversation? [144]

A. My brother Perry asked him what the Randells had in the way of security, I believe—I am

(Testimony of Earl Burnham.)

not too familiar really with all that went on but he did say that they had property of the value of from \$75,000.00 to \$90,000.00.

Q. Was anything said about the title as you recall? A. No, not that I recall.

Q. And then you attended a meeting in the Hotel Boise that evening? A. Yes, sir.

Q. Was anything said at that time about the title?

A. I don't know just what was said, but I have it in my mind that there was a mortgage on the Mike Randell farm, and on that day or the evening before we went to look at those farms that was mentioned.

Q. That was the day you went to Mike Randells—I am asking about the conversation in the Boise Hotel?

A. Yes, should I go ahead and tell the conversation?

Q. Yes, the best you can.

A. After we came back from the Carl Randell farm and Mike Randell's farm I mentioned the fact to Mr. Abegglen that it was a wonderfully fine farm of Carl's. He said: "Well, he has a standing offer of \$40,000.00 for it," and I said: "Why doesn't he sell it?" and he said: "Well, he thinks if he kept it and developed the crops and sold [145] it later after the crops were taken that he would get more out of it and the crops."

Q. Did you know at that time that he didn't—that Carl Randell did not have title to it?

(Testimony of Earl Burnham.)

A. No, sir, the fact of the matter is, I asked how much Carl owed on his place and he said: "Nothing."

Q. Who did you ask that?

A. Mr. Abegglen.

Q. Did you rely on his statement?

A. Yes, sir.

Q. If you had known that Carl Randell didn't own the property, and didn't have title to it, would you have entered into the contract to sell the Randells the Cove Ranch?

A. No, sir, I would not.

Q. And would you have signed the commission agreement in evidence here?

A. No, sir.

Q. Were you present at the meeting in Twin Falls—strike that, please—I will ask this, first; were you present at the August meeting at the Cove Ranch when the contract was changed?

A. No, I was not.

Q. Were you present at the meeting in Twin Falls in April, 1949?

A. Yes, sir.

Q. What offers did you or your brother make to the Randells [146] in regard to their staying on the property?

A. My brother asked if it was all right with me if we offered to finance them to some extent and keep them on there; I didn't do any of the talking about the financing.

Q. Did you hear your brother make any statement?

A. Yes, sir.

Q. What did he tell them?

(Testimony of Earl Burnham.)

A. In substance, that we would be willing to finance them to some extent to keep them going.

Q. Was anything said about waiving the payment of interest that would soon be due?

A. Yes, sir, but I don't remember the exact wording—we talked a long time trying to work out some way to keep them on there. I don't seem to recall anything definite—any words or definite meaning of what we did say except that we were willing to finance them to a certain extent if they would work out some way to keep on going up there.

Q. And what did the Randells say?

A. They seemed to be in the mood a part of the time—they did state they thought they could make a go of it, and then again in a little while, for instance, Ed said that he didn't think that they ought to try, and Mike would throw in once in a while and say, "Well, I don't see how I can get up there with my mother the way she is." I don't recall a lot of our talk. I know that Carl talked about the same way; that he thought it was best that they didn't try to go on.

Q. Mr. Abegglen testified that you and your brother demanded that they pay \$10,000.00 advance, did you make any such a demand? A. No, sir.

Q. Did you hear your brother make such a demand? A. No, sir.

Mr. Worthwine: You may examine.

(Testimony of Earl Burnham.)

Cross-Examination

By Mr. Bird:

Q. You did tell them that if they could raise \$10,000.00 you could revamp the set up?

A. I don't think so.

Q. Do you remember the figure \$10,000.00 being used in this conversation?

A. No, I don't.

Q. Did you hear your brother's testimony earlier today? A. Yes, sir.

Q. And did you hear Mr. Skeen's testimony?

A. Yes, sir.

Q. Didn't he testify in substance to that effect?

A. I don't think he did; I don't think it meant that.

Q. You were present at the Boise Hotel conference in May, 1948? A. Yes, sir. [148]

Q. Did you at that meeting see or hear Mr. Ed Randell present this slip showing the status of his obligation to the Reclamation Department?

A. No.

Q. Were you out of the room during a part of the conference?

A. Yes, sir, I was out with one or two persons and back again around there.

Q. You would not say that he did not present that to the meeting?

A. No, sir, I would not.

Q. Did you hear it stated that Mike owed \$4,000 or \$5,000 on his place?

A. Yes, sir, I got it from someone in the group.

Mr. Bird: That is all.

Mr. Worthwine: That is all.

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

February 10th, 1950, 10:00 o'Clock A.M.

JACK LEIGHTON

being called as a witness by the Defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Worthwine:

Q. Where do you live?

A. Moore, Idaho. [149]

Q. Did you ever live on the Cove Ranch?

A. Yes, sir, up until the first of May, 1948.

Q. There has been testimony here concerning a visit to various places, were you present when the Burnhams and others met at the ranch near Eden in 1948?

A. Yes, sir.

Q. With whom did you travel?

A. Mr. Abegglen picked me up at the Cove Ranch and I rode with him in his automobile to Eden, and from Eden to Boise, and on out to New Plymouth and Parma, and back to Boise, and then back to the ranch.

Q. Did you attend a meeting on the evening of the day you had been to Eden at the Boise Hotel?

A. Yes, sir.

Q. Then you went to New Plymouth and back to Boise?

A. Yes, sir.

(Testimony of Jack Leighton.)

Q. You were present when the contract was read?
A. Yes, sir.

Q. Do you recall anything said by Mr. Abegglen when you arrived at the ranch at New Plymouth?

A. He told me that was Carl's ranch. As I recall he told me the number of acres that was in it, but I don't remember the exact acres.

Q. At any time did he tell you that Carl was buying it on a contract?

A. I was not told that, no. [150]

Q. Were you present at the meeting in Twin Falls in April, 1949?
A. I wasn't there.

Q. Did you visit the Cove Ranch—change that—where were you living with respect to the Cove Ranch in the winter of 1948 and 1949?

A. I lived approximately 70 miles from the Cove Ranch.

Q. Did you visit the Cove Ranch in the spring of 1949?

A. I was there about the first of April, 1949.

Q. Was there a machine shed on the Cove Ranch?

A. It was used for various reasons.

Q. How large was it?

A. Well, that shed—it is not clear which you are referring to.

Q. Did any shed have a roof caved in?

A. There was a shed that we used for a loafing shed for the cows, about 150 feet long and 20 or 25 feet wide that had collapsed.

(Testimony of Jack Leighton.)

Q. And do you know the cause?

A. Yes, sir, from the snow piling on the roof.

Q. Were there other buildings damaged?

A. Another building that we had fixed up to milk in.

Q. How large was it?

A. It was large enough for stanchions for 20 head of cows. [151]

Q. What happened to that building?

A. It was completely demolished.

Q. Is it necessary to keep the snow off the roofs in that country?

A. If there are no animals in them, the snow will pile on the roof.

Q. Did you notice one of the tractors that had been left there in the spring of 1949?

A. I inspected all of the machinery in the spring of 1949.

Q. What did you find with respect to the tractor?

A. One had been left with water in the motor, it was badly frozen and broken.

Q. Did you secure an estimate of the cost of repair to that?

A. There was an estimate made of the cost of repairing it, and it would run to approximately \$380.00.

Q. Were there some horses on the ranch?

A. Yes, sir, six head of horses.

Q. Had they wintered out? A. Yes, sir.

Mr. Worthwine: That is all, you may examine.

(Testimony of Jack Leighton.)

Cross-Examination

By Mr. Bird:

Q. Had these horses wintered out on previous winters? A. No, sir, they hadn't.

Q. What type of sheds were those that were broken down? [152]

A. One was open on one side with a wall and ends and a tin roof.

Q. And what size were the supporting posts?

A. It was braced about every 14 or 16 feet with supporting posts, I cannot remember their exact size, they were native poles, unsawed, approximately 8 inches in diameter.

Q. How long had it been there?

A. I don't know the exact date it was built, but it was there for several winters.

Q. It wasn't unusual for sheds to cave in in that area during that particular winter?

A. No, it wasn't.

Q. Wasn't the winter of 1948 and '49 an unusually severe one?

A. You mean continually or just by spells?

A. Well, either or both?

A. At times it was a very heavy snow, but clear through the winter there wasn't much accumulated.

Q. You don't know what storm it was or what

(Testimony of Jack Leighton.)

date these sheds collapsed?

A. No, I wasn't present.

Q. Were you present at the conference in May, 1948, when this contract was signed?

A. Yes, sir.

Q. Were you in and about the room and heard the discussion and the remarks by the contracting parties? [153]

A. I was there but it was impossible to hear all of the conversation.

Q. Did you hear any discussion about titles to the Randell brothers property, about their ranches?

A. I heard some of it.

Q. Tell us all that you remember.

A. If I recall correctly there was a balance due on the Ed Randell ranch and there was some balance due on the Mike Randell place.

Q. You heard the discussion on that?

A. Yes, sir.

Q. Did you hear any mention made of Carl's place? A. I heard it mentioned, yes, sir.

Q. Do you remember what that statement was, the substance of it?

A. The substance as I remember it was that Carl had a right to mortgage his ranch.

Q. Was there anything said as to whether or not he had a deed for it—his ranch?

A. I don't recall hearing that.

Mr. Bird: That is all.

(Testimony of Jack Leighton.)

Redirect Examination

By Mr. Worthwine:

Q. You understood that he had title?

A. It was in my mind that he did, yes, sir.

Mr. Worthwine: That is all. [154]

And we rest at this time.

The Court: Do you have any rebuttal?

Mr. Bird: Yes, we will call Carl Randell.

CARL RANDELL

being recalled in rebuttal, having been heretofore duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. You were at the Cove Ranch during the winter of 1948 and 1949 several times?

A. Yes, sir.

Q. Did you make any arrangement to have what stock, crops and machinery was there taken over?

A. I made the arrangement with Mr. Baldwin to clean the snow off the roofs. Each time we had a storm at Twin Falls or Hailey I would call him to go and clean it off, I kept it off the house once or twice a week. This storm that broke the shed down, it snowed about 26 inches during the night and day and he said that he couldn't get there to get it off.

Q. What is your recollection as to the condition of the supporting posts in this shed?

(Testimony of Carl Randell.)

A. The shed was very poorly constructed. The supports inside the ceiling joists and the rafters in the milking barn were eight feet apart at least; ordinarily, the storms [155] would slip off this roof in the milking room, but it snowed all night and it was too heavy for it.

Q. These roofs were not supported as well as it is customary to build them?

A. No, not in that country.

Q. Did you know about the machines that were left there and frozen?

A. That was being used one day by one of the men hired, and he allowed it to sit there; he opened it up and drained it, but he didn't start it up and some of the water was left in there and that is what caused it to freeze.

Q. He was employed by you? A. Yes, sir.

Q. Had you given him instructions to drain it?

A. Yes, sir, they all had instructions to drain on of the tractors.

Q. You were in the Boise Hotel at a meeting on the 11th and 12th of May, 1948? A. Yes, sir.

Q. And you signed the contract?

A. Yes, sir.

Q. You took part in the negotiations?

A. Yes, sir.

Q. Was any discussion had relative to your ranch—what your ownership was? [156]

A. In the group there with Mr. Abegglen, we told him that I was purchasing it under a contract—my brother spoke up about that time and said,

(Testimony of Carl Randell.)

“And I think Carl owed more against his ranch than either of the other two.”

Q. Were either of the Burnhams in the group of men there?

A. We were all in that group in those rooms, yes, sir.

Q. In your judgment what was the value of your ranch at that time?

A. We were trying to sell it for \$40,000.00—that was the beet equipment and the crops.

Q. How much did you owe on the ranch at that time?

A. I cannot say exactly, but it was around \$15,000.00.

Q. And what would be that value at this time, would there be any change in the value?

A. Well, it would be about the same, I have an idea.

Q. Were you familiar with your brother Ed's ranch? A. Yes, sir.

Q. And what would have been the reasonable market value of that ranch at that time?

A. I figured that he should have got at least \$30,000.00.

Q. Were you familiar with your brother Oreal's ranch? A. Yes, sir.

Q. What in your opinion would have been a reasonable market value of that ranch? [157]

A. As a whole set up, not less than \$35,000.00.

Mr. Bird: I think that is all.

(Testimony of Carl Randell.)

Cross-Examination

By Mr. Worthwine:

Q. When did you surrender possession of your ranch at New Plymouth?

A. I think it was about the 21st of June.

Q. Who took possession?

A. A fellow by the name of Wookey.

Q. Had you been trying to sell that contract on that ranch?

A. Yes, when we was working up this deal I tried to sell.

Q. When did Mr. Abegglen first visit your New Plymouth ranch?

A. I cannot recall the date.

Q. He had been there sometime before the meeting in Boise in May? A. Yes, sir.

Q. And talked with you about the ranch?

A. Yes, sir.

Q. Did you at that time—the first time that he came down there, tell him that you didn't have title and that you were buying on a contract?

A. I told him what I had in the ranch and that I was purchasing it on a contract when he visited the home.

Q. That was about how long before you met in Boise, that Mr. Abegglen visited the ranch? [158]

A. I don't recall.

Q. Would it be as much as a month before that?

A. No, I don't think it was that long.

(Testimony of Carl Randell.)

Q. And you explained to him fully the condition of your title?

A. Yes, sir, that I was purchasing it on a contract and we were trying to sell for a figure—a good figure.

Q. You owe \$15,000.00? A. Yes, sir.

Q. How much cash did you get out of it?

A. I cannot say how much.

Q. What did you receive for your equity?

A. I got myself \$5,000.00 after all the thinning expenses and such as that.

Q. The property itself with the growing crops, 40 acres in sugar beets, you received \$5,000.00?

A. Not for my equity then, there was the additional—my expense of caring for the beets at that time.

Q. You surrendered possession about June 21st, 1948? A. Somewhere in that neighborhood.

Mr. Worthwine: That is all.

Redirect Examination

By Mr. Bird:

Q. In addition to that you owned a considerable amount of machinery and equipment?

A. Yes, sir. [159]

Q. And would you be able to put an approximate value on that?

Mr. Worthwine: We object to that as being incompetent and immaterial to any of the issues here, there was not included in the mortgage any machinery or equipment.

The Court: I think it is immaterial under the latter agreement; that matter was all taken care of.

Mr. Bird: I think that is all.

Mr. Worthwine: That is all.

ED RANDELL

being called by the Plaintiff, in rebuttal, having heretofore been first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. You were present at the meeting in the Boise Hotel in the early part of May, 1948?

A. Yes, sir.

Q. You took part in the discussion leading up to the agreement? A. That's right.

Q. In this discussion was anything said about the status of your ranch?

A. I made the statement, and also gave Mr. Skeen a slip, or a statement from the Denver office, as I had a loan from [160] the government on that, and that was stipulating exactly the amount of the first lien on the place.

Q. What in your judgment would be the fair market value of your ranch at that time—your whole outfit, machinery and stock?

Mr. Worthwine: I don't see the materiality of this, especially the machinery and the stock.

The Court: He may answer.

A. My inventory showed about \$35,000.00.

The Court: You might segregate that as to the value of the land if you care to.

(Testimony of Ed Randell.)

Q. This paper which has been marked Exhibit No. 17, are you familiar with that? A. I am.

Q. What is that?

A. That is our Black Canyon Project—all the lands are appraised with a governmental appraisal so that if it is sold for more than their appraisal, part of the selling price would go back to them—so they appraise our property because they don't want us to sell. If we sell for \$1,000 more than they appraise it for then they get \$500.00 of that, and to avoid any mixup it is appraised every once in a while.

Q. Is this a reappraisal under that government program? [161] A. Yes, sir.

Q. When did you receive that?

A. November 15th, 1949.

Mr. Bird: We offer this in evidence.

Mr. Worthwine: We object to it, it is not signed by anyone, and it is all typewritten; it is immaterial for any purpose here.

Mr. Bird: It is preliminary.

The Court: I suggest to you in view of the objection, which I feel I must sustain, that you have him testify as to the value.

A. That is the fair value.

The Court: What do you figure as a fair value?

A. I cannot say.

Mr. Bird: I will ask another question.

The Court: Very well.

Q. \$25,540.60 on here, now then, what was the amount of the Reclamation lien?

(Testimony of Ed Randell.)

A. It is a little over \$4,000.00—\$4,200.00, or something like that.

Q. As you were concluding that conference in the hotel in May, 1948, was anything said about furnishing a description to Mr. Skeen for the preparation of the mortgage?

A. I don't recall whether they required it from us or from Abegglen, but they asked if I had a deed to the property. [162]

Q. You later sent a description to Mr. Skeen?

A. I sent Mr. Skeen a deed to both pieces of property, one was clear and the other had this lien.

Q. Do you remember who asked for this?

A. Mr. Skeen.

Mr. Bird: That is all, you may examine.

Cross-Examination

By Mr. Worthwine:

Q. All the land in the Black Canyon Project has a limitation of resale value?

A. All of it has this appraisal, you can sell it, but if you get over that appraisal then you split with them.

Mr. Worthwine: I believe that is all.

The Court: This mortgage for \$4,000.00, that is in force is it?

A. Yes.

Q. It is still of record? A. Yes, sir.

Q. You understand it will be released upon payment of this five or six thousand?

(Testimony of Ed Randell.)

A. That is the understanding.

Mr. Bird: That is all.

Mr. Worthwine: Nothing further. [163]

OREAL RANDELL

being called by the Plaintiff, in rebuttal, having heretofore been first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. Did you testify as to the value of your ranch?

A. I don't know as I did.

Q. What in your judgment was the reasonable value of your ranch in May of 1948?

A. I listed it for \$38,000.00.

Q. Would that be your best judgment of its value? A. Yes, sir.

Q. Has there been any change or much change in land values in the meantime?

A. No, no noticeable amount.

Q. You were present at the conference in May, 1948, at the Boise Hotel? A. Yes, sir.

Q. And you took part in the discussion leading to the contract? A. Part of it, yes.

Q. And was the condition of your ranch discussed in that meeting?

A. Well, I think it was understood that I owed a mortgage on it.

Q. About how much was that mortgage? [164]

A. Approximately \$6,000.00.

Q. And Mr. Bunrham, the two Burnhams, or

(Testimony of Oreal Randell.)

either of them, and Mr. Skeen, were they in the group where it was discussed?

Mr. Worthwine: We object to that, I don't think he has testified that it was discussed.

The Court: I think your question is kind of a double-barreled question.

Mr. Bird: I will withdraw it.

Q. Were Mr. Skeen and the Burnhams in the group where this value was discussed?

A. Yes, sir.

Q. And in this discussion you mentioned that you had a mortgage on your farm or ranch?

A. Yes, sir.

Mr. Bird: That is all.

Mr. Worthwine: No questions.

HAROLD ABEGGLEN

being called by the Plaintiff, in rebuttal, having heretofore been first duly sworn, testifies as follows:

Direct Examination

By Mr. Bird:

Q. You heard some discussion as to when you first met the Burnham brothers, do you have any recollection where you met Perry Burnham? [165]

A. Yes, sir, it is clear, Perry and Earl Burnham came to my office in Hailey.

Q. Is that where these negotiations were instituted? A. That was the first meeting.

Q. Did Mr. Skeen come to your office at that time?

(Testimony of Harold Abegglen.)

A. I don't recall seeing Attorney Skeen until the Twin Falls meeting.

Q. Where was this listing signed between you and the Burnhams?

A. That was in Twin Falls, after we came to an agreement on the commission to be paid me, and the date of the signature was April the 29th.

Q. When and where was the addendum on the back of it signed?

A. At the Boise Hotel on the consummation of the contract of sale.

Q. There was a discussion as to the statement you made to the Burnhams concerning the value of this property; now do you have a clear recollection as to what you advised them?

A. I advised them that in the three Randells ranches they had a \$70,000 equity; I didn't stipulate that they were clear.

Q. Was there anything said as to liens on the property?

A. Yes, sir, I think it was clear at that meeting.

Q. Did the statement of the value take into consideration the fact that there were mortgages on the property? [166]

A. Yes, sir.

Q. And what was said about those mortgages to be signed on the three ranches?

A. Attorney Skeen made the request of the Randells to send the descriptions to him at Salt Lake City—he couldn't wait in Boise. He made no request of me or I would have remained in Boise and secured the information.

(Testimony of Harold Abegglen.)

Q. Did you discuss that with Mr. Skeen?

A. Yes, sir.

Q. What was that discussion?

A. I suggested that he remain and secure that information, and he said that he couldn't remain here, that he had to go back to Salt Lake City, and that he would carry on the transaction through the mail.

Q. In reference to the demand, that has been mentioned, that the Burnhams made of the Randells for \$10,000.00, what were the facts in regard to that?

A. That was in the meeting at the Park Hotel, it wasn't a demand, it was a request by the Burnhams from the Randells that if they could raise \$10,000.00 by some means they would consider re-vamping the agreement to their satisfaction. I was at the meeting a good deal.

Q. Did you take part in the discussion at the meeting at Twin Falls on that occasion? [167]

A. I did until Saturday and then adjourned.

Q. They had not come to any agreement when you left?

A. They had not come to any agreement, no.

Q. In showing people these ranches, did you or had you referred to them as Carl's ranch?

A. When Jack Leighton and I met there at New Plymouth we took them to Carl's place and we said this is the ranch that we said was Carl's; they viewed the ranch and then we took them to Parma and showed them Ed's ranch; they talked to the

(Testimony of Harold Abegglen.)

owners—not always in my presence, and they asked them questions.

Q. Are you familiar with this check that is introduced for \$500.00 given for the weir?

A. Yes, sir, that was give by Jack Leighton to me to pay for the cost of the weir at the court house in Hailey, to the man who handles those accounts.

Q. What did you say about the debt on Carl's ranch?

A. I didn't know the amount he owed on the ranch; all I knew was that he was buying on a contract and had been there a couple of years; that his equity was equal to the amount mentioned in the contract.

Q. Was any statement made to the effect that he owed nothing on this ranch? [168]

A. Never, no, sir.

Mr. Bird: That is all.

Mr. Worthwine: No questions.

Mr. Bird: We rest.

Mr. Worthwine: The Defendants rest.

Mr. Bird: At this time we desire to move the amendment to the complaint to conform with the proof. In the first line of paragraph two of the complaint where it states, "On April 29th, 1949," that is an error, and it should be "April 29th, 1948."

Mr. Worthwine: No objections.

Mr. Bird: And then down about five lines in the same paragraph, on the 5th line it says: "Hailey

(Testimony of Harold Abegglen.)

and Blaine County, Idaho.” That should be a comma between Hailey and Blaine County.

Mr. Worthwine: We have no objection.

The Court: Those amendments may be made.

Mr. Bird: And on the second page, “1949” appears twice, “April 29, 1949,” and “May 15, 1949,” each of these should be “1948.”

Mr. Worthwine: We have no objection to changing 1948 to—or rather in the place of 1949.

The Court: The amendments may be made. [169] I understand it is agreed that a transcript is to be made of the proceedings and the parties may each have thirty days after the delivery of the transcript in which to prepare their briefs and present them. Of course, you may prepare them as early as you can or want to after the delivery of the transcript, and you may each pay one-half of the cost, and the Court will either assess the cost or let each side pay for himself. The matter will be taken under advisement at this time, awaiting the filing of your briefs. You, Mr. Bird, may have thirty days in which to file your brief, and Mr. Worthwine—the Defendants may have thirty days after service of Plaintiff’s brief in which to reply, and if necessary the Plaintiff may have an additional ten days.

Certificate

State of Idaho,

County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States Dis-

trict Court, for the District of Idaho, Southern Division, and

I further certify that I took the evidence and proceedings had in and about the trial of the above-entitled cause in shorthand and thereafter transcribed the same into typewritten form; and

I further certify that the foregoing transcript consisting of pages numbered consecutively to page 170 is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof, I have hereunto set my hand this 22nd day of March, 1950.

/s/ G. C. VAUGHAN.

[Endorsed]: Filed March 23, 1950.

[Endorsed]: No. 12648. United States Court of Appeals for the Ninth Circuit. Perry E. Burnham and L. Earl Burnham, Appellants, vs. J. Harold Abegglen, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed August 10, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, Ninth Circuit

No. 12648

PERRY E. BURNHAM and L. EARL
BURNHAM,

Appellants,

vs.

J. HAROLD ABEGGLEN,

Appellee.

STATEMENT OF POINTS ON APPEAL

Come now the appellants and make the following Statement of Points on Appeal:

1. That Finding No. 7 is contrary to the evidence in that it appears, without conflict, that the Randell brothers had abandoned the ranch and were unable to proceed further under the contract of sale.

2. That Finding No. 9, that plaintiff was free from misconduct, concealment or misrepresentation, is contrary to the evidence.

3. That Finding No. 10 is contrary to the evidence in that it affirmatively appears from the evidence that the Randall brothers could not complete the contract of sale because Carl Randall had no land upon which he could give a mortgage, which fact was known to plaintiff and concealed by him from the defendants when the contract of agency was made.

4. Conclusion of Law No. 2 is not justified by the evidence and is not sound in law for the reason

that because of the failure of Carl Randall to give a note and mortgage, the contract of sale was not complete. That plaintiff knew Carl Randall could not give a mortgage because he had no deed to his property which fact he concealed from the defendants, and defendants were compelled to protect the property to make a new and different arrangement with the Randalls.

5. That by plaintiff's own admissions, he knew that Carl Randall did not have a deed to his property and could not comply with the contract at the time the original contract of sale was made, and the agency agreement was signed by the defendants.

6. Conclusion of Law No. 4 is contrary to law in that defendants were compelled to make a new agreement to protect their property and avoid litigation because the original agreement could not be consummated and they were justified in disregarding the agency agreement because plaintiff had concealed from them the fact that Carl Randall did not have title to his property and could not perform under the original contract of sale.

7. Conclusion of Law No. 5 is not justified by the evidence and is contrary to the law in that defendants were compelled to enter into the agreement of August 12th and the new agreement was not in any sense a waiver of their rights to defend as against plaintiff's agency agreement because they had been put in a position where they were compelled to act by the concealment on the part of the agent.

8. Conclusion of Law No. 6 is not supported by the evidence in that the Randalls were in default, had abandoned the ranch, and defendants were required to enter into negotiations with them to protect their interests and to avoid litigation.

9. Conclusion of Law No. 7 is not supported by the evidence and the law.

10. The contract of sale by the defendants to the Randalls was not completely executed because Carl Randall could not give a mortgage on deeded land as provided in the contract.

11. The broker's agreement was dependent upon and was to take effect only upon the execution and delivery of the original contract of sale which was not consummated as drawn.

12. The original contract of sale was not so far ratified or given effect as to put in force the agency agreement, but because Carl Randall could not give a note and mortgage upon deeded land to secure performance, another and different contract was necessarily made after the Randalls went into possession.

13. The relation of principal and agent existed between plaintiff and defendants and required of plaintiff the utmost good faith which he betrayed by withholding from defendants knowledge of the fact that Carl Randell did not have title to the farm. farm.

14. Participation by plaintiff in putting Randalls in possession of the property when he knew

Carl Randall could not give a mortgage upon the farm, exhibited to the defendants as his property, and did not own the same, should estop plaintiff from recovering a commission.

Dated this 24th day of August, 1950.

/s/ J. D. SKEEN,

/s/ PERRY H. BURNHAM,

Attorneys for Appellants.

State of Utah,

County of Salt Lake—ss.

Emily Urry, being first duly sworn, deposes and says: That she is a stenographer employed in the office of J. D. Skeen, one of the attorneys for the appellants above named; that on August 24, 1950, she enclosed a copy of the foregoing Statement of Points on Appeal in an envelope addressed to.

Bissell and Bird, Attorneys at Law, First Security Bank Building, Gooding, Idaho, affixed correct postage thereto and deposited the same in the United States Post Office at Salt Lake City, Utah, for delivery to the said addressees.

/s/ EMILY URRY.

Subscribed and Sworn to before me this 24th day of August, 1950.

[Seal] /s/ THOS. W. MUIR,

Notary Public.

My commission expires Nov. 22, 1950.

[Endorsed]: Filed August 26, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION RE EXHIBITS

It is hereby stipulated and agreed between counsel for the respective parties that the following-described exhibits in the above-entitled cause may be considered in their original form by the appellate court, without the necessity of the same being printed as a part of the official printed record:

1. Plaintiffs' exhibit 1 (broker's license);
2. Plaintiff's exhibit 2 (broker's commission agreement);
3. Plaintiff's exhibit 5 (water assessment receipt);
4. Plaintiff's exhibit 8 (quitclaim deed);
5. Plaintiff's exhibit 10 (letter of J. D. Skeen dated July 30, 1948);
6. Plaintiff's exhibit 12 (letter re marketing cattle); and
7. Plaintiff's exhibit 13 (Kraft Co. letter).

Appellee hereby waives and withdraws the designation of additional portions of record requested to be printed by filing bearing date September 6, 1950.

/s/ J. D. SKEEN,

/s/ PERRY H. BURNHAM,

Attorneys for Appellants.

/s/ E. B. TAYLOR,

/s/ W. G. BISSELL,

/s/ BRANDON BIRD,

Attorneys for Appellee.

So Ordered:

/s/ CLIFTON MATTHEWS,

/s/ HOMER BONE,

/s/ WALTER L. POPE,

United States Circuit Judges.

[Endorsed]: Filed September 20, 1950.

United States Court of Appeals for the Ninth Circuit

PERRY E. BURNHAM and L. EARL
BURNHAM,

Defendants and Appellants,

vs.

J. HAROLD ABEGGLEN,

Plaintiff and Appellee.

No. 12648

APPELLANTS' BRIEF

J. D. SKEEN

PERRY H. BURNHAM

Attorneys for Appellants

Salt Lake City, Utah

FILED

NOV 16 1950

PAUL P. O'BRIEN,

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PROPOSITIONS TO BE ARGUED:

1. That plaintiff grossly misrepresented the value of the Randalls' ranch as being \$70,000.00 and concealed from the appellants a fact which he, at all times knew, and which is not in controversy, that Carl Randall did not have title to the farm shown appellants by plaintiff as Carl Randall's farm..... 9

2. That appellants, having become involved in permitting the Randalls to go into possession of the ranch and livestock upon the representation that each of the Randalls owned farms exhibited to them, had a right to modify the contract, change the security and ultimately to rescind it without subjecting themselves to liability to the plaintiff for a commission....9-10

3. At all events plaintiff was not entitled to more than \$2,000.00 for not more than \$25,000.00 was paid, about one-half of which was received from the sale of Burnham's cattle and Randalls had breached the contract by abandoning the property. The court erred in making Finding No. 7 to the effect that the " . . . purchasers (the Randall Bros.) were not in default on the contract of purchase in any respect," and in Conclusion of Law No. 6 to the same effect.... 10

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United States Court of Appeals for the Ninth Circuit

PERRY E. BURNHAM and L. EARL
BURNHAM,

Defendants and Appellants,

vs.

J. HAROLD ABEGGLEN,

Plaintiff and Appellee.

No. 12648

APPELLANTS' BRIEF

STATEMENT OF THE CASE

This action was filed in the District Court for Blaine County, Idaho, and was removed to the United States District Court for the District of Idaho, on the ground of diverse citizenship, the subject in controversy exceeding the sum of \$3,000.00 exclusive of interest and costs. Section 1332, Title 28, U.S.C.A.

The plaintiff filed an Amended Complaint in which he alleged that he was a licensed real estate broker; (Tr. 9) that

on the 29th day of April, 1948, he was employed by the defendants to procure a purchaser for real estate located in Blaine County, Idaho, known as the Cove Ranch containing approximately 3313 acres of land. The terms upon which the property was to be sold were alleged as: total consideration, \$140,000.00, \$25,000.00 cash, balance on time. The Agency Agreement is incorporated in the Amended Complaint. It is in the usual form, and there is added on the back of the contract, the following: (Tr. 36)

“\$2,000.00 when the first \$25,000.00 is paid and \$2,000.00 when the second \$25,000.00 is paid, and the remaining \$2,000.00 when the full down payment of \$70,000.00 is paid on the purchase price of this Cove Ranch, making a total of \$6,000.00 commission.”

The contract as modified, by changing the amount of the commission and the dates, was signed in Boise, Idaho, on May 12, 1948. There is considerable confusion in the record as to the signing of the instrument prior to the adding of the note, but all agree that the note was signed at the Boise Hotel when a contract for the sale of the property between the appellants and Carl H. Randall, Edward Randall and Oriel Randall was signed.

The contract of sale provided that in lieu of the cash payment, three separate notes would be signed by each of the Randalls—Carl Randall, Edward Randall and Oriel Randall—that each of the notes would be secured by a real estate mortgage upon farms represented to be owned by the Randalls. The contract provided (Tr. 20) that:

“Said mortgages to be in usual form, and the status of the Title to the said Real Estate is to be disclosed

by a report of abstractor for the Counties in which the said land is located, showing conveyances affecting the Title to said land since Deeds were received by the respective owners."

Before the signing of the contract of sale and the agency agreement, the plaintiff, appellee herein, took the defendants to three farms, showed them the crops and improvements and represented that the three farms were owned by the Randalls and were of a value of \$70,000.00 (Tr. 201). There is no controversy as to the fact. The plaintiff testified to it. Shortly after the contract of sale was signed at Boise, Oriel Randall signed a note for \$25,000.00, and furnished a description of his property with an abstract showing the status of the title as provided in the contract. In the course of time, Edward Randall also signed a note and with his wife, a mortgage covering property owned by him. Carl Randall signed a note but furnished no description of his property. The defendants caused an investigation to be made and found that Carl Randall owned no farm. He was on the farm exhibited as his farm as a contract purchaser. The description was never furnished. It appeared during the trial that on June 21, he sold his equity in the property which plaintiff represented to be of a value of \$40,000.00 and got \$5,000.00, (Tr. 77, 125) used the money to pay debts and to purchase machinery (Tr. 195). Plaintiff knew at all times that Carl Randall had no title to the land, that he was purchasing it on contract (Tr. 77, 83). Shortly after the contract was signed, Carl Randall moved to the ranch. Plaintiff assisted him in doing so, by checking over the livestock and farm implements covered by the contract of sale, attended to the payment of some taxes

and did such other things as he could do to establish Carl Randall on the property (Tr. 62).

During the latter part of May, June and July, while appellants were endeavoring to get their security cleared up, Carl Randall planted grain, irrigated the land, put up hay, maintained a dairy herd on the ranch, and in other respects proceeded as if he had performed his contract. When it was found that Carl Randall could not perform under the original contract because he had no farm, appellants entered into another agreement with the Randalls (Tr. 9) by the terms of which the cattle which were included in the contract of sale were returned to the Burnhams and they waived the mortgage security of his note.

Carl Randal remained on the ranch until the approach of winter in 1948, at which time he abandoned the premises, taking with him all of his livestock, farm implements and all of the removable improvements or additions he had made to the property (Tr. 187). The ranch was left unoccupied during the winter of 1948 and 1949, and up to April 4th of the spring of 1949. For want of care in removing snow from buildings and otherwise protecting the property some of the buildings collapsed (Tr. 14).

The Burnhams, feeling that their ranch was in jeopardy, on April 4th made another agreement with the Randalls under which they released the Randalls from their contract of purchase. While the Randalls were in possession of the property, after the agreement under which the cattle were returned, the Burnhams sold the cattle and they also received the landlord's

share of grain grown. In the aggregate, their returns from the sale of cattle and the sale of one-third of the grain were approximately \$25,000.00. The exact amount was not determined by the court. The original contract of sale provided that Burnhams should receive the landlord's share of the grain, and they, at all times, held title to the cattle which were released under the contract of August 12, 1948.

The issues presented to the District Court and now before this Court are as follows:

1. As to whether the failure of Abegglen to reveal the fact that Carl Randall had no farm of record to which he could show an abstract disclosing conveyances or entries affecting title to the farm *from the date of the deed to him*, and misrepresentations respecting the value of the farm constituted such misconduct on the part of the agent as would bar a recovery of the commission.

2. As to whether in the circumstances the Burnhams subjected themselves to liability for the full commission by modifying the agreement and taking back the cattle or by making the agreement of April 4, 1949, releasing the Randalls from the contract of purchase of the ranch.

3. As to whether the application of the landlord's part of the wheat crop and the proceeds from the sale of the cattle constituted such a payment on the contract as would subject the Burnhams to an obligation to pay \$2,000.00 on account of the commission.

The District Court resolved these issues in favor of the plaintiff and against the defendants.

See opinion (Tr. 35) and Finding No. 9

“That the plaintiff was free from misconduct, concealment or misrepresentations in all dealings with the defendants.”

and Conclusion of Law No. 3:

“The plaintiff was not guilty of misconduct toward his principals, the defendants, nor did he conceal material facts from his said principals, nor did he make misrepresentations to his said principals, in effecting the sale of said property to the Randalls.”

Appellants contend tht neither the finding of fact nor the conclusion of law is supported by the evidence.

The court further found that the mutual modification of the original agreement by the contract of August 12, 1948, was such a waiver as would entitle plaintiff to the full commission. Finding No. 6.

That the rescission of the original contract on April 4, 1949, releasing the Randalls was made without the knowledge, consent or approval of the plaintiff, (Findings 7 and 8) and operated as a waiver of any right the Burnhams had to rescind the original contract on account of “any claim, misconduct, concealment or misrepresentation of the plaintiff in effecting the sale of the said property for the defendants, and “waived the right to successfully assert any misconduct, misrepresentation or concealment on the part of the broker in bringing about the sale of the said property.” And further, that defendants abandoned the sale of said property and the payments upon the purchase price were obviated and plaintiff’s full

commission was forthwith matured and become payable (Finding 6).

The appellants claim that the court was in error in finding and concluding that the modification of the contract on August 12th and the taking back of the cattle and the rescission of the contract on April 4, 1949, operated as a waiver of their rights growing out of the asserted concealment and misrepresentation on the part of the plaintiff in withholding from them the facts pertaining to the ownership of the farm shown to them as Carl Randall's farm and misrepresentations with respect to the value of the property.

The appellants contend that the rights of the parties, appellants and appellee herein, are to be determined as of the date of the making of the contract of sale and the agency agreement, to-wit: May 13, 1948. Having become involved with the Randalls through the misrepresentations and concealments of the plaintiff, appellants claim that they had a perfect right without obligating themselves to the plaintiff to extricate themselves and save their property as best they could. The propositions, therefore, to be argued are as follows:

1. That plaintiff grossly misrepresented the value of the Randall's ranch as being \$70,000.00 and concealed from the appellants a fact which he, at all times knew, and which is not in controversy, that Carl Randall did not have title to the farm shown appellants by plaintiff as Carl Randall's farm.

2. That appellants, having become involved in permitting the Randalls to go into possession of the ranch and livestock upon the representation that each of the Randalls owned

farms exhibited to them, had a right to modify the contract, change the security and ultimately to rescind it without subjecting themselves to liability to the plaintiff for a commission.

3. At all events plaintiff was not entitled to more than \$2,000.00 for not more than \$25,000.00 was paid, about one-half of which was received from the sale of Burnham's cattle and Randalls had breached the contract by abandoning the property. The court erred in making Finding No. 7 to the effect that the " . . . purchasers (the Randall Bros.) were not in default on the contract of purchase in any respect," and in Conclusion of Law No. 6 to the same effect.

ARGUMENT

I

PLAINTIFF GROSSLY MISREPRESENTED THE VALUE OF THE RANDALL'S RANCH AS BEING \$70,000.00 AND CONCEALED FROM THE APPELLANTS A FACT WHICH HE, AT ALL TIMES KNEW, AND WHICH IS NOT IN CONTROVERSY, THAT CARL RANDALL DID NOT HAVE TITLE TO THE FARM SHOWN APPELLANTS BY PLAINTIFF AS CARL RANDALL'S FARM.

SUMMARY OF ARGUMENT

The testimony is somewhat in conflict as to what was said and done at the meeting at the Boise Hotel in Boise on

May 11th, and particularly as to whether any statement whatsoever was made to the effect that Carl Randall was buying the farm shown to the Burnhams by Abegglen upon a contract, but the agency agreement and the contract of sale, we think, must be considered as a record of that meeting. The testimony is without conflict that the contract of sale by the Burnhams to the Randalls was read and discussed in the presence of Abegglen after which it was signed by the Burnhams and Randalls. Carl Randall immediately went into possession of the property, and Abegglen aided him in making inventories, paying water assessments and otherwise beginning his farming operations. Furthermore, the testimony is without conflict that Abegglen told Burnhams "that in the three Randall ranches they had a \$70,000.00 equity" (Tr. 201).

That is Abegglen's testimony. Abegglen further testified (Tr. 77) that he had visited the Carl Randall ranch, and

"Q. The testimony was that at the time it was worth \$40,000.00?

A. That was the appraised valuation that Mr. Randall gave.

Q. Did it look to you to be worth that amount?

A. It looked pretty good to me.

Q. Did you know whether Mr. Randall had title to that?

A. I was advised that he did not.

Q. Were you advised who did have title?

A. No, sir; I knew that he was buying it on a contract.

Q. Did you know from whom he was buying it?

A. No, sir."

Again (Tr. 79-80):

"Q. The mortgages were to be executed by the three Randall brothers, Oreal, Carl and Edward?

A. That is right.

Q. The property to be mortgaged was the \$40,000.00 ranch at New Plymouth?

A. That is correct."

The New Plymouth ranch is the property shown as the Carl Randall farm. The position of the appellants is that a duty rested upon Abegglen, as the agent of the Burnhams, to disclose to them in a proper way at the time the contract was being read, that Carl Randall did not have the legal title to the ranch and that no abstract showing the status of the title from the date of the deed to him could be furnished to the Burnhams; that in failing to disclose that fact at that time and in cooperating with the Randalls in putting them in possession of the property, Abegglen was guilty of fraudulent concealment. The concealment was material because Burnhams were delivering to the Randalls approximately \$40,000.00 worth of cattle and farm equipment in reliance upon this security which Abegglen considered to be of a value of \$40,000.00.

The court erred in Finding No. 9 which is not fully shown on page 48 of the brief, and which reads as follows:

"That plaintiff was free from misconduct, concealment or misrepresentation in all of his dealings with the defendants."

and in drawing Conclusion of Law No. 3:

"The plaintiff was not guilty of misconduct toward his principals, the defendants, nor did he conceal material facts from his said principals, nor did he make misrepresentations to his said principals, in effecting the sale of said property to the Randalls."

The contract sued upon in this case reads:

"In consideration of your agreement to list the property and to use your efforts to find a purchaser, I hereby appoint and constitute you my agent with right to sell the following described property for a period of Sixty days from date hereof, and thereafter until you receive from me a written notice terminating this agency and agreement" (Tr. 6).

That established the confidential relationship between Abeglen and the Burnhams and carried with it the duties of an agent to disclose all of the facts within his knowledge affecting the value of the property.

In *Porter v. Buckley*, 127 Oregon 22, 270 Pac. 905, the court said:

"... It should require no citation of authorities that an agent who undertakes to contract with his principal must make a full, fair and frank disclosure of the facts concerning the transaction. It will not do to obtain knowledge while acting as the agent and use it to the detriment and damage of the principal."

and in 2 *Mechem on Agency*, 2nd Edition, Section 2411, page 1974, the rule is stated as follows:

"Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests. This rule clearly requires that the broker shall not cheat or defraud his principal in any dealings which they may have together or deceive him to his injury by false statements or representations, or allow his principal to be injured in his dealings through the broker by reason of any concealment or suppression by the broker of information necessary for the principal to have for the protection of his own interests. But the broker's duty also goes further. He must not assume or continue the relations, if his duty to his principal and his own interests will come in conflict. It is his duty, therefore, to freely and fully disclose to his principal at all times, the fact of any interest of his own, or of another client, which may be antagonistic to the interests of his principal, and he will not be permitted to take advantage of his situation to make gain for himself by forestalling or undermining his principal."

Wadsworth v. Adams, 138 U. S. 380, 34 L. Ed. 984-986

"We cannot give our assent to the proposition that Adams, being a special agent only, was not guilty of a breach of duty in withholding from his principal information of the fact that McComb was willing to take the notes at a discount of eight per cent per annum, that is, for \$380,000.00, provided he could not get them for \$350,000.00. That fact came to his knowledge before he and McComb separated on the 27th of March, and good faith, upon his part, required that he should at once, with the utmost dispatch, have communicated it to his principal, and not have permitted him—pressed for money, as Adams knew him to be and as he took care to inform McComb he was—to consider the offer of \$350,000.00, in the belief that that was the highest price his agent could obtain for the notes."

The burden is upon the agent to show that he acted in perfect good faith and was not guilty of concealment.

Triggs v. Jones, 46 Minn. 277, 48 NW 113

Balls v. Moseley, 150 Ark. 210, 211 SW 1084

Featherstone v. Thorne, 82 Ark. 381, 102 SW 196

If it is be claimed that the defendant in good faith thought he had informed the defendants or their attorney of the fact that Carl Randall had no property upon which he could give a mortgage, still his duty was not fully performed because it was a continuing duty to keep the defendants informed as to the facts.

In Holmes v. Cathcart, 88 Minn. 213, 92 NW 956, 6 LRA 734, 97 Am. St. Reps. 513 the court said:

"He (agent) is bound to the exercise of the most perfect good faith and to keep his principal informed of facts coming to his knowledge affecting his rights and interest."

McBride v. Campredon, 24 N. Mex. 323, 171 Pac. 140, LRA 1918

McMurray v. Garnett, 182 SW 128, not reported in State Reports

Pacific Vinegar and Pickle Works v. Smith, 162 Cal. 507, 93 Pac. 85

Wilcox v. Reynolds, 169 Okla. 153, 36 Pac. 2nd 488

Robertson v. Chapman, 152 U. S. 673, 38 L. Ed. 596

ARGUMENT

II

APPELLANTS, HAVING BECOME INVOLVED IN PERMITTING THE RANDALLS TO GO INTO POSSESSION OF THE RANCH AND LIVESTOCK UPON THE REPRESENTATION THAT EACH OF THE RANDALLS OWNED FARMS EXHIBITED TO THEM, HAD A RIGHT TO MODIFY THE CONTRACT, CHANGE THE SECURITY AND ULTIMATELY TO RESCIND IT WITHOUT SUBJECTING THEMSELVES TO LIABILITY TO THE PLAINTIFF FOR A COMMISSION.

SUMMARY OF ARGUMENT

Immediately after the signing of the contract, on May 12, 1948, the Randalls went into possession of the Cove Ranch, began farming operations and mingled their cattle and farming implements with those covered by the contract of sale. The Burnhams might have rescinded the Randall contract in its entirety and repossessed the ranch, but complications might have resulted in litigation which the Burnhams wished to avoid. Insofar as the plaintiff was concerned, the damage had been done and the Burnhams had a right to extricate themselves from the complications with the Randalls as best they could and without any concern whatsoever on the part of the plaintiff because he was responsible for getting them in that predicament. Likewise, after Carl Randall had moved from the ranch taking with him the property he had put on it

and with every evidence of abandonment, the Burnhams had a right to enter into a contract of rescission of the entire agreement in order to save themselves from further losses, and this, without regard to the plaintiff for the reasons above stated. The status of the contract as between the Burnhams and the plaintiff was fixed as of May 12, 1948, when the contract was signed. It was then that the plaintiff was guilty of concealment and misrepresentation and while it was his continuing duty to advise the Burnhams of the fact which he at all times knew that Carl Randall had no farm, the Burnhams had the right to act as if their contractual relations with the plaintiff ended with the misrepresentations.

ARGUMENT

In 1 Mechem on Agency, Section 1207, page 882, it is said:

"As has been already seen, it is absolutely essential, when an agent undertakes to sustain dealings with his own principal, that it shall appear that the agent frankly and freely gave to his principal full information respecting, not only the agent's relations to the contract, but also, the various conditions respecting time, value, situation, condition and the like, which may fairly be deemed to be material in determining upon the desirability of entering into the contract. But even where the agent is not personally interested in the contract, his duty to give the principal full information of all the material facts relating to the transaction, which are within his knowledge, still exists. A failure to perform this duty, while not necessarily rendering transactions with third persons voidable,

as it would do if the agent were himself personally interested, will still make the agent liable to the principal for any losses which he has proximately sustained thereby."

The district court was in error in holding that because the Burnhams saw fit to make the second agreement as of August 12th, in view of the situation as it then existed with the Randalls in possession of their property, that they thereby waived the right to rescind or that the plaintiff acquired a right to enforce the agency agreement.

The rule to the effect that the broker is entitled to his compensation when he finds a purchaser "able, ready and willing" to buy the property is not applicable.

The two contracts—the contract of agency and the contract of sale—were separate and distinct. While the agency contract was clearly dependent upon the contract of sale, it was a different contract. It is true that Abegglen found the Randalls who were supposed to be ready, willing and able to purchase the property by the giving of the three mortgages upon the three farms, which the plaintiff represented the three Randalls owned. Carl Randall, having no farm, prevented the purchasers from making the contract. If the negotiations had ended there, and if during the life of the agency agreement, negotiations had been taken up between the Burnhams and the Randalls aside from the misrepresentations and if no complications had resulted from the misrepresentations, and a contract satisfactory to the Burnhams had been made, possibly the rule would apply and Abegglen would be entitled to his commission. That was not the case. Abegglen and

the Randalls had represented that they owned the three farms—the Randalls, by the signing of the agreement, and Abegglen, by taking Burnhams to the Carl Randall farm and showing it as Carl Randall's farm. In reliance upon this assurance, Burnhams permitted the Randalls to go into possession of their ranch and livestock. Abegglen participated in putting them in possession. The representation as to the ownership of the farm was material to the extent of \$40,000.00. The record discloses that Burnhams would not have entered into any contractual relations with the Randalls had they known that Carl Randall had no farm. The showing to them of a farm in the possession of Carl Randall and which Abegglen knew he did not own, as the farm of Randall, was a flagrant misrepresentation and concealment and the concealment continued until the facts were discovered in the latter part of June.

As said by the Supreme Court of Arkansas in

Featherstone v. Thorne, 82 Ark. 381, 102 SW 196,
under similiar circumstances:

“If these facts were true (concealment) and Thorne attempted wilfully to mislead Featherstone in that way, we are of the opinion that Featherstone was justified in discharging him as agent and that Thorne forfeited his right to claim from Featherstone pay for his services.”

It has been and will no doubt be again argued that it was the duty of Burnhams, in their own interest or the duty of their attorney, to examine the record and to have ascertained for themselves whether the representation that Carl Randall owned the farm exhibited to the Burnhams as his farm and in failing

to do so, that they could not be heard to complain. In this connection, the case of

Bishop v. E. A. Strout Realty Company, 182 Fed. 503, Adv. Sheet No. 3, page 503 is very closely in point.

Chief Judge Parker said:

"We do not think that plaintiffs are precluded of recovery because they accepted and relied upon the representations of Davis as to the depth of the water without making soundings or taking other steps to ascertain their truth or falsity. The depth of the water was not a matter that was apparent to ordinary observation; Davis professed to know whereof he was speaking; and there was nothing to put plaintiffs on notice that he was not speaking the truth. There is nothing in law or in reason which requires one to deal as though dealing with a liar or scoundrel, or that denies the protection of the law to the trustful who have been victimized by fraud. The principal underlying the caveat emptor rule was more highly regarded in former times than it is today; but it was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed. The modern and more sensible rule is that applied by the Court of Appeals of Maryland in *Standard Motor Co. v. Peltzer*, 147 Md. 509, 510, 128 A. 451, where it was held not to be negligence or folly for a buyer to rely on what had been told him. This is in accord with the modern trend in all jurisdictions which is summed up in A.L.I. Restatement of Torts, Sec. 540 . . . "

ARGUMENT

III

AT ALL EVENTS PLAINTIFF WAS NOT ENTITLED TO MORE THAN \$2,000.00 FOR NOT MORE THAN \$25,000.00 WAS PAID, ABOUT ONE-HALF OF WHICH WAS RECEIVED FROM THE SALE OF BURNHAM'S CATTLE AND RANDALLS HAD BREACHED THE CONTRACT BY ABANDONING THE PROPERTY. THE COURT ERRED IN MAKING FINDING NO. 7 TO THE EFFECT THAT THE " . . . PURCHASERS (THE RANDALL BROS.) WERE NOT IN DEFAULT ON THE CONTRACT OF PURCHASE IN ANY RESPECT," AND IN CONCLUSION OF LAW NO. 6 TO THE SAME EFFECT.

SUMMARY ARGUMENT

Oriel Randall and Ed. Randall were not on the ranch. They had left the ranch operations to Carl Randall. In November of 1948, Carl Randall moved from the ranch taking with him all of the improvements that he had put on that were removable, and his own livestock and left the ranch wholly without protection except such as a neighbor might give. Some of the buildings collapsed, the motor in one tractor froze up, and in all respects the ranch had the appearance of an abandoned property. In addition to this, Ed. Randall testified (Tr. 69) in reply to a question as to whether he could go on with the contract as follows:

"A. I had no chance whatever to pay.

Q. Could your brothers meet it, the other two that were interested?

A. It is possible that my brother Mike could.

Q. You heard him testify that he had illness in the family that prevented him from going there?

A. Yes, sir.

Q. Did you know of that illness?

A. Yes, sir, I did.

Q. That is one of the principal reasons that he wanted out of the contract?

Oriel Randall testified (Tr. 113-114)

A. That was the main reason that we didn't continue on."

"Q. Were you interested in retaining it under the terms of the contract then in force?

A. Under the old contract?

Q. Yes.

A. Yes, we would have went on if the conditions had not made it such that it looked like it would be better to quit.

Q. What were those conditions?

A. The main objection was my mother became ill, and it was pretty necessary for me to stay and take care of her.

Q. That illness of your mother was what prevented you from going ahead with the contract?

A. That was the main thing and the finance that looked like it would be hard to get; if they

had set the interest back and the fall payment,
I think we could go ahead."

While Carl Randall had signed a note, he had paid nothing on it and it was useless to look to him for any participation whatsoever. There is no justification for holding that under these circumstances Burnhams were obliged to further jeopardize their property in order to make a commission for the plaintiff.

The record in its entirety shows that plaintiff, while acting as the defendants' agent, grossly misrepresented the facts as to the ownership and value of the Randall property which he assumed and concealed the facts from the appellants, not disclosing them even after he participated in putting Carl Randall on the ranch. So far as appellants were concerned, they were through with the plaintiff because of the deception. They were confronted with the complication which would either involve them in litigation or loss. Appellants were not required to engage the Randalls in litigation in order to protect themselves as against the plaintiff. Primarily, he was the wrong-doer—not the Randalls. The court clearly erred in deciding and finding that plaintiff was not guilty of misrepresentation and concealment and even though he were that appellants waived their defense by settling with the Randalls without litigation.

Respectfully submitted,

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United States Court of Appeals for the Ninth Circuit

PERRY E. BURNHAM and L. EARL
BURNHAM,

Defendants and Appellants,

vs.

J. HAROLD ABEGGLEN,

Plaintiff and Appellee.

No. 12648

BRIEF OF APPELLEE

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Union

RENEWAL

CHARTER

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United States Court of Appeals for the Ninth Circuit

PERRY E. BURNHAM and L. EARL
BURNHAM,

Defendants and Appellants,

vs.

J. HAROLD ABEGGLEN,

Plaintiff and Appellee.

No. 12648

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Some qualification of the statement of facts contained in appellants' brief is deemed necessary.

There is some confusion with reference to when the addition to the broker's contract was made. It was signed April 29, 1948, by the appellants, and the modification of the terms of payment of appellee's commission was made either May 12th or May 15th, 1948, at the Boise Hotel. (Tr. 8, 79, 102).

The statement appears at page 5 of appellants'

brief that the inspection of the Randall ranches was made prior to the signing of the agency agreement. The record shows that the agency agreement was made April 29th, 1948, prior to the inspection. The addenda to the agreement was made either on May 12th or May 15th, 1948, after inspection.

Contrary to appellants' statement, at page 5 of the brief, that appellee represented the Randall ranches to be of the value of \$70,000.00, he in fact stated that they had a \$70,000.00 equity therein. (Tr. 201).

Further, appellee did not represent the three Randall farms to be owned outright by the Randalls, as set out at page 5 of the brief. As a matter of fact, the record shows that appellants were aware that two of the Randall ranches had prior liens against them, and that Carl Randall was buying his ranch on contract. (Tr. 84-85, 192-193, 196, 199-200.) Again, contrary to the statement at page 5 of appellants' brief, that appellee represented Carl Randall's equity to be \$40,000.00, the facts are that this was the total value of the real estate, growing crops and beet equipment, without deducting the contract balance due of \$15,000. (Tr. 77, 119, 193). The equity in Carl Randall's ranch was therefore approximately \$25,000.

Appellants show that Carl Randall received \$5000.00 for his equity in his ranch, their brief at

page 5; however, it is apparent that this is not a correct indication of the true worth of his equity. Randall was forced to sell it at an upset price, which did not reflect the true value. (Tr. 120-121.)

At page 6 of appellants' brief, the statement appears that Carl Randall "abandoned the premises" (referring to the Cove Ranch), and that the premises were left unoccupied during the winter of 1948 and 1949; that for want of care or removing snow from the roof the buildings collapsed. The record (Tr. 90-91, 98) discloses the Randalls did not intend to, nor did they, abandon the Cove Ranch, but on the contrary they were going to return in the spring and had made plans so to do. The cattle were moved for the winter to lower country, (Tr. 121), and as a matter of fact each of the Randalls had leased their other farms so that they would be in a position to work the Cove Ranch, commencing in the spring of 1949. (Tr. 95-96, 101, 111, 124). The Randalls arranged for a caretaker to watch the ranch during the winter season. (Tr. 99, 121, 191). Further, an unusually severe snow storm with a fall of 26 inches in depth, caused the collapse of the roofs which were not well constructed, considering the weather conditions in the country. (Tr. 191-192).

While appellants' statement of the case is extremely brief, considering the involved factual situation, it is not thought essential to further develop the facts.

POINTS OF LAW AND SUMMARY OF ARGUMENT

I

THE TRIAL COURT, AFTER A FULL PRESENTATION OF THE CASE FOR BOTH SIDES, RESOLVED THE ISSUES AGAINST THE APPELLANTS. THE FINDINGS OF THE TRIAL COURT AND ITS JUDGMENT ARE PRESUMPTIVELY CORRECT. IF THE FINDINGS AND JUDGMENT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, THE JUDGMENT WILL BE AFFIRMED.

II

WHERE A REAL ESTATE BROKER HAS PRODUCED A PURCHASER, READY, WILLING AND ABLE TO BUY, ON THE TERMS PROPOSED BY THE SELLER, THE BROKER HAS PERFORMED HIS PART OF THE AGREEMENT AND IS ENTITLED TO PAYMENT OF THE COMMISSION, AS AGREED UPON BETWEEN THE PARTIES. IN THE ABSENCE OF AGREEMENT TO THE CONTRARY, UPON EXECUTION OF THE SALE AND PURCHASE AGREEMENT BETWEEN BUYER AND SELLER, THE BROKER IS ENTITLED TO HIS AGREED COMMISSION.

III

APPELLANTS HAVE COMPLETELY FAILED TO ESTABLISH "CLEAR AND CONVINCING" FRAUD OR MISREPRESENTATION ON THE PART OF APPELLEE. FURTHER APPELLANTS' SUBSEQUENT RECOGNITION AND MODIFICATION OF THE SALES CONTRACT, AFTER DISCOVERY OF THE ALLEGED MISREPRESENTATION OR MISUNDERSTANDING, ESTOPS THEM FROM ASSERTING FRAUD AS A DEFENSE.

IV

WHEN APPELLANTS VOLUNTARILY ENTERED INTO AN AGREEMENT WITH THE PURCHASERS, SUBSEQUENT TO THE EXECUTION OF A BONA FIDE SALE AND PURCHASE CONTRACT, WHEREBY THE CONTRACT WAS RESCINDED — THE RIGHTS OF THE PARTIES COMPROMISED — AND MUTUAL RELEASES GIVEN — ALL WITHOUT THE CONSENT, ACQUIESCENCE OR APPROVAL OF THE APPELLEE, HE WAS THEN IMMEDIATELY ENTITLED TO HIS FULL BROKER'S COMMISSION.

ARGUMENT

I

THE TRIAL COURT, AFTER A FULL PRE-

SENTATION OF THE CASE FOR BOTH SIDES, RESOLVED THE ISSUES AGAINST THE APPELLANTS. THE FINDINGS OF THE TRIAL COURT AND ITS JUDGMENT ARE PRESUMPTIVELY CORRECT. IF THE FINDINGS AND JUDGMENT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, THE JUDGMENT WILL BE AFFIRMED.

The record in this case is replete with numerous instances of conflicting testimony with respect to the most important issue in the case—the question of whether or not the Burnhams had knowledge of the prior liens on the Randall ranches, and the fact that Carl Randall did not have title to his ranch, but rather was purchasing it under a contract.

The trial court, unlike this court, had the opportunity of hearing the testimony of the various witnesses, and of observing their demeanor while on the witness stand. After a full hearing and thorough study, the court resolved the conflicts of the evidence in favor of the appellee.

This court can not lightly set aside the judgment of the trial court upon these issues.

In *Mendez vs. Mendez*, 176 Fed 2d 849, the court stated at page 851:

“This action was tried without a jury, and due regard shall be given to the opportunity of the trial court to judge the credibility of

the witnesses.”

Also, in *Maloy vs. New York Life Insurance Co.*, 103 Fed. 2d, 439, it was said:

“ * * * and where the credibility of witnesses is a determinative factor in arriving at the findings of fact, as was the case here, the reviewing court will not usually upset those findings made by the judge who had the opportunity of seeing and hearing the witnesses testify. (Citations)”

In *Maiatico v. Holden*, 153 Fed. 2d, 654, the court in affirming a judgment for the plaintiff, and after referring to the fact that the court heard or observed the witnesses, stated:

“The testimony as a whole, including that just referred to, is confused. The findings of fact of the trial judge are in some detail. On this state of a record, we will not disturb the conclusion of the court unless we find clear error.”

As authority for the proposition that the findings of Judge Clark and his judgment based thereon, are presumptively correct, reference is made to the case of *Federal Savings and Loan Insurance Corporation vs. First National Bank*, 164 Fed. 2nd 929, where at page 932, we find the following quotation:

“Certainly, if the findings of the court are sustained, by substantial evidence, the judg-

ment appealed from should be affirmed. These findings are presumptively correct and must be sustained unless clearly erroneous." Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723 c; (Citations).

We are not at liberty to substitute our judgment for that of the trial court and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained."

II

WHERE A REAL ESTATE BROKER HAS PRODUCED A PURCHASER, READY, WILLING AND ABLE TO BUY, ON THE TERMS PROPOSED BY THE SELLER, THE BROKER HAS PERFORMED HIS PART OF THE AGREEMENT AND IS ENTITLED TO PAYMENT OF THE COMMISSION, AS AGREED UPON BETWEEN THE PARTIES. IN THE ABSENCE OF AGREEMENT TO THE CONTRARY, UPON EXECUTION OF THE SALE AND PURCHASE AGREEMENT BETWEEN BUYER AND SELLER, THE BROKER IS ENTITLED TO HIS AGREED COMMISSION.

Prior to a consideration of the basic rules govern-

ing the recovery of commissions by real estate brokers, it would be well to develop the extent of appellee's efforts in putting buyer and seller together in this instance. Mr. Abegglen, prior to making a contract with the Randalls took a number of prospects to the Cove Ranch, and went over the ranch in great detail with Mr. Layton. (Tr. 52). After the Randalls became interested he corresponded with them and visited their ranches at Eden, Parma, and New Plymouth, Idaho. He visited the Eden ranch "a half-dozen times before the sale was consummated," the New Plymouth ranch three times, and the Parma ranch twice, besides trips to Twin Falls and to Boise. (Tr. 76-77). The evidence discloses that appellee participated in the inspection of the ranches with appellants, and in the discussions and meetings leading up to the execution of the sales contract. It can be stated unqualifiedly that the appellee was the procuring cause in putting buyer and seller together under the sales contract dated May 15, 1948.

The general rule of law applicable to this situation is clear cut. In order for a real estate broker to be entitled to his commission for the sale of land he must produce a purchaser who is able, ready and willing to buy the lands on the terms proposed by the seller or agreed to by him. A clear statement of this principal is found in *Down vs. DeGroot*, 256 Pac. 438, where at page 439 we find the following:

“The rule with reference to the liability of one who in writing agrees to pay a broker a commission for the sale of real property is almost universally understood to be that when the broker has produced a purchaser ready, able, and willing to buy on the terms proposed by the seller, the broker has performed his part of the contract and is entitled to the payment to him of the commission as agreed upon by the parties.”

This rule has been recognized in Idaho as appears from the following cases:

Phillips vs. Brown, 21 Idaho 62, 120 Pac. 454;

Deal and Hawley vs. Scrivner, 66 Idaho 99, 155 Pac. 2d 920.

The latter case cites several additional Idaho cases, including that of Thomas vs. Young, 42 Idaho 240; 245 Pac. 75, the court stating at page 244:

“However, before plaintiffs are entitled to recover the commissions claimed for finding a purchaser, they must either obtain a contract from a proposed purchaser able to buy, whereby he is legally bound to buy on the authorized terms or *they must produce to the principal a proposed purchaser who is able, willing and ready to buy upon the terms authorized.*” (Emphasis ours).

A case quite similar to that here argued is *Simmons vs. Libbey*, 208 Pac. 2d 1070. In that case, the purchaser expected to sell some Colorado property and use the proceeds for meeting a contract obligation. The sale did not materialize and he was unable to comply with his sales agreement. The court pointed out that the fact of knowledge on the part of both the parties to the sales contract, that the purchaser's ability to pay the contract price depended upon the sale of the Colorado property,

“No more defeated the defendant's right to his commission than if the condition had rested upon his ability to borrow the money. This was a chance the seller chose to take. In doing so, he did not therefore expose the broker's right to a commission, to the same hazard. When the owner accepted the prospect produced by defendant as a purchaser, the broker's right to a commission became fixed. (Citation).”

The court also reiterated the general principle heretofore expressed. A striking parallel is to be drawn between the *Simmons* case and the case at bar. Here the *Randalls* were disappointed in not being able to dispose of their respective ranches as advantageously as expected. The *Burnhams* had full knowledge of this situation, and this cannot operate to deprive appellee of his right to the agreed commission.

There appears to be a unanimity in courts holding that a real estate broker is entitled to his commission upon the execution of a sales and purchase agreement between owner and purchaser, in the absence of stipulation or agreement to the contrary.

When the appellants and the Randalls executed the sales contract, dated May 15, 1948, the former unqualifiedly acceded to the revised terms of sale. Their original proposition stipulated a \$25,000.00 cash down payment. At the time of the signing of the contract of May 12th or May 15th, the appellants had had ample opportunity to inspect and had inspected the security tendered by the Randalls. The signing of the contract by appellants was a clear indication that they were satisfied with the ability of the purchaser to meet the terms of payment, as agreed upon, and the appellants were satisfied with the ability and willingness of the purchasers to meet the payments, as they matured.

In support of this we refer to the case of *Lockett vs. Drake*, 31 Pac. 2d 499, where after a broker was employed to sell real property, a contract was drafted and signed by the owner and purchaser. The court said:

“It is the almost universally accepted rule of law that, in the absence of a specific contract to the contrary when a real estate broker has brought together the parties to a sale or exchange of real estate, and they have

agreed fully on the terms and entered into a binding contract for such sale or exchange, his duties are at an end and his commission is fully earned, and it is immaterial that the parties to the contract rescind mutually or that one or the other thereof defaults and the sale or exchange is not fully affected. (Citations)''.

The court concludes its opinion with the observation that it is unfortunate that the owner is compelled to pay a commission when the broker's services did not produce the anticipated results, but since the owner accepted the proposition, the broker could not be denied his commission. In a later decision the same court following this rule in *Eason vs. Heighton*, 65 Pac. 2d 1373.

Reiterating the rule are the following authorities:

Myers vs. Selggio, 181 Pac. 2d 690;

Ralston vs. Demirjian, 194 Pac. 2d 41;

McNamara v. Steckman, 202 Cal. 569; 262 Pac. 297;

Collopy vs. Stevenson, 265 Pac. 1098.

Moore vs. Irwin, 116 SW 662;

Keinath vs. Reed, 137 Pac. 841;

Deeble vs. Stearns, 186 Pac. 2d 173;

Note, 169 ALR 611; 12 CJS 185, Note 26;
Note, 51 ALR 1392.

Applying the foregoing authorities to the facts of this case, it is clear that appellee is entitled to his commission unless fraud and misrepresentation have been established.

III

APPELLANTS HAVE COMPLETELY FAILED TO ESTABLISH "CLEAR AND CONVINCING" FRAUD OR MISREPRESENTATION ON THE PART OF APPELLEE. FURTHER APPELLANTS' SUBSEQUENT RECOGNITION AND MODIFICATION OF THE SALES CONTRACT AFTER DISCOVERY OF THE ALLEGED MISREPRESENTATION OR MISUNDERSTANDING, ESTOPS THEM FROM ASSERTING FRAUD AS A DEFENSE.

The appellants in their brief have stated that the appellee grossly misrepresented the value of the Randall ranches, and concealed from them the fact that Carl Randall did not have title to his ranch, the inference being, of course, that had appellants known of these facts that they would never have entered into the sales contract with the Randalls.

We think that a careful reading of the record in this case will completely refute appellants' argument. In the first place, it is not even argued that Carl Randall, although only a purchaser of a ranch

under contract, did not have a mortgageable interest in said property. The rule is clearly established in Idaho that a contract purchaser of real estate has an interest therein which may be transferred, and hence may be mortgaged.

Perkins vs. Bundy, 42 Idaho 560; 247 Pac. 751.

Further, Section 45-1001 of the Idaho Code provides that "Any interest in real property, which is capable of being transferred, may be mortgaged."

Further, the contract of sale between the appellants and the Randalls (Exhibit 3) provides only that the Randalls would give mortgages upon the described real estate, and it was not stipulated therein that the mortgages should be first mortgages.

In any event, there is a definite conflict in the evidence as to whether or not appellee informed appellants that the title to the ranches were clear.

Perry Burnham stated:

"Mr. Abegglen said that they had from \$75,000 to \$90,000 in their property, in valuation in the clear." (Tr. 138).

On the other side of the conversation, Mr. Abegglen's states that he told the Burnhams that the three Randalls had in their ranch "\$70,000 equity; I didn't stipulate that they were clear." (Tr. 201).

The latter statement of the value took into consideration the fact that there were mortgages on the property. (Tr. 201).

Edward Randall testified that he informed Mr. Skeen, the Burnham's attorney, that there was a lien against his ranch. (Tr. 110).

Jack Layton confirmed this. (Tr. 190), and Perry Burnham also knew of this lien. (Tr. 145). The net value of Edward Randall's ranch and equipment was \$21,140.60.

It is clear from not only the testimony of Orel Randall (Tr. 94, 199), but also from the admission of Perry Burnham, that appellants had knowledge of a first lien on Orel Randall's ranch. (Tr. 144). The evidence disclosed Orel Randall's security to be at least \$33,000.00. Carl Randall testified that the situation relative to his title was discussed with Burnham while at the meeting. (Tr. 118). This is again substantiated by Jack Layton. (Tr. 190). It is significant that Perry Burnham recalled that two of the Randall ranches were encumbered, and that he had knowledge of this prior to the execution of the contract of sale. However, appellants' attorney, who drafted all of the documents, and who participated in the Boise Hotel meeting, stated on the witness stand:

"So far as I knew from anything that was said there the title was clear in Carl Randall and Ed Randall, there was no mention of

mortgages made with respect to either of those ranches." (Tr. 155).

Granted that the testimony of interested parties perhaps can be discounted, but surely the testimony of disinterested witnesses, who had no axe to grind, substantiates appellee's position that appellants had full knowledge of the condition of the titles to the Randall properties. Obviously this was the conclusion of the trial court.

Totalling the equities in the respective Randall ranches, the information about which appellants had full knowledge at the Boise Hotel conference, we find it amounts to approximately \$71,149.60. This justifies completely appellee's representation to appellants that the Randalls had an equity in their property of around \$70,000.00. This figure even dovetails with the testimony of Perry Burnham, wherein he stated that appellee represented to him the equity to be between \$75,000.00 and \$90,000.00.

Perhaps the most important issue in this case is the question of fraud. Appellants have made an extremely serious charge which should not be lightly made or found. It is an elementary principle that the party making the charge of fraud or misrepresentation must prove the same by clear and convincing evidence.

Hill vs. Wilkinson, 60 Idaho 243, 90 Pac. 2d 696;

Farmers Exchange vs. Calkins, 103 Pac. 2d
230.

A recent Idaho case, Nelson vs. Hoff, decided May 10, 1950, and reported at 218 Pac. 2d 345, contains the following statement:

“Fraud will not be presumed and appellants have the burden of establishing all the elements of fraud alleged by clear and convincing evidence. (Citations).

* * * It would unduly lengthen this opinion to discuss the evidence upon which the court based such findings; suffice it to say that a careful examination of the evidence discloses that each of the court's findings in this respect is based upon substantial, competent although conflicting, evidence. This court has frequently and uniformly held that findings of fact supported by competent, substantial, although conflicting evidence, will not be disturbed on appeal. (Citations.)”

In concluding this point, we submit that there is ample evidence to support the determination by the trial court that the appellants had full knowledge of not only the values of the Randalls' equities, but also as to the condition of their respective titles, and that there was a complete absence of fraud or misrepresentation on the part of appellee.

IV

WHEN APPELLANTS VOLUNTARILY ENTERED INTO AN AGREEMENT WITH THE PURCHASERS, SUBSEQUENT TO THE EXECUTION OF A BONA FIDE SALE AND PURCHASE CONTRACT, WHEREBY THE CONTRACT WAS RESCINDED — THE RIGHTS OF THE PARTIES COMPROMISED — AND MUTUAL RELEASES GIVEN — ALL WITHOUT THE CONSENT, ACQUIESCENCE OR APPROVAL OF THE APPELLEE, HE WAS THEN IMMEDIATELY ENTITLED TO HIS FULL BROKER'S COMMISSION.

To briefly summarize the facts pertinent to this section of the brief, after the first contract of sale was formally drawn and signed, approximately 90 days later a modified contract between the Burnhams and the Randalls was agreed upon and executed, which cleared up some of the difficulties and objections which had developed since the drafting of the original contract. Thus it is clear that the terms of the sale were then satisfactory to the sellers, who had had ample opportunity to ascertain all of the facts. The Randalls had already entered upon the Cove Ranch under their contract, and were engaged in farming operations, and had done considerable improvement work on the property. Substantial payments in cash and in kind had been made to the Burnhams. In April, 1949, a confer-

ence was called at Twin Falls, Idaho, between the Burnhams and the Randalls. There is a conflict in the testimony as to just which party called this conference. The Randalls thought the Burnhams had requested it, and Mr. Burnham testified that he came to the conference at the request of a Mr. Baldwin,—Mr. Baldwin, of course, being a real estate broker who had lined up a third party to purchase if the Randalls were out of the picture. At this time it is clear that there was no default under the contract of sale—neither the first year's installments on principal or interest having yet become due.

Appellants had declared no forfeiture, and of course, had no right to forfeit out the Randalls. Out of this meeting in Twin Falls there came a mutual rescission of the contract to purchase, the Randalls giving the Burnhams a quitclaim deed, and the Burnhams agreeing to release the mortgages and cancel all notes upon the payment by the Randalls within one year of the sum of \$6000.00, together with interest at 6 per cent. *Apellee was not a party to this compromise and settlement, nor did he acquiesce or agree to any of the terms of the settlement.*

It is apparent that the Burnhams voluntarily participated in this compromise settlement without the consent or approval of the appellee. They alone were responsible for bringing about a situation where the

contract of sale was of no further force nor effect. The record shows that the Randalls, although somewhat reluctant to continue on, were in a position so to do—certainly they were legally obligated, had the Burnhams insisted upon their living up to the contract terms.

The weight of authority stands behind the proposition that a broker is entitled immediately to his commission, even though it be on a pro-rata or installment basis, where he had put the buyer and seller together, a contract has been executed, and subsequently, without the broker's consent or approval there is a rescission of the contract.

The general rule is stated in the case of *Tarbell vs. Bomes*, 135 Atlantic 604. In this case a broker was employed to sell real estate, his commission to be paid upon the delivery of the deed and payment of the consideration. The broker procured a purchaser and a binding contract of sale was entered into upon an installment purchase basis. Later the purchaser, after negotiations, but without the consent of the broker, entered into a compromise with the seller, and the purchaser was released from the contract obligation. The broker was successful in his suit for the full commission.

In the language of the court:

“The test by which to determine the broker's right to commission when conditional upon the complete carrying out of the

contract, is whether the seller used due diligence and reasonable efforts to secure performance of the contract of sale. * * * Release of a seller's rights to a legally bound buyer is not permissible at the expense of the broker who has brought the parties together and done all that he could to help the seller secure performance."

A further statement in this case:

"We have found no case where, after a valid contract of sale, a seller has released the buyer on account of sympathy, generosity, or unwillingness to enter upon litigation which could be prosecuted to a successful conclusion and by such release has prevented the broker from recovering a commission." Emphasis ours).

Rather than prolong this brief unduly, we cite the court to the following cases — ample authority to back up this rule—

Ratzlaff vs. Trainor-Desmond Co., 183 Pac. 269;

Kendrick vs. Speck, 67 Fed. 2d 295;

Preston vs. Postel, 300 Fed 134;

Wolley vs. Bishop, 180 Fed. 188;

12 CJS 200;

Neff vs. Schrader, 191 NW 466;

Combs vs. Hendricks, 238 SW 546;

Brown vs. Marty, 187 NW 181;

Bush vs. Abraham, 35 Pac. 1066;

Lesser vs. McGerry & Co., 8 Pac. 2d. 1058;

Carl vs. Eade, 253 Pac. 750;

Kinney vs. Wither, 295 Pac. 793;

Grant vs. McLaughlin, 217 Pac. 873;

Crane vs. Eddy, 61 NE 431; 85 ALR 284.

CONCLUSION

We append to this brief the careful considered opinion of the Hon. Chase Clark, which sustains appellee's contentions made in the District Court, and we doubt that we have here improved upon the analysis there made by him.

Upon reading all of the cases referred to and cited in appellants' brief. we honestly must admit that we have no quarrel with the references to the duties and obligations of an agent to his principal. However, we feel that they have no specific application to the case at bar. It is our position, which position met with the approval of the trial judge, that appellee dealt openly, fairly and above board with his principals, the appellants, throughout all of the transactions. Because the appellants, after they had entered into the Randall agreements, found the pur-

chaser not satisfactory to them, and thus released voluntarily the Randalls from the contract obligations, should not in any way under the law or under the facts prejudice the recovery by appellee of his full earned commission. It is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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Boise, Idaho.

Attorneys for Plaintiff and
Appellee.

IN THE
United States District Court
District of Idaho

Southern Division

J. HAROLD ABEGGLEN,

Plaintiff,

vs.

PERRY E. BURNHAM and
L. EARL BURNHAM,

Defendants.

No. 2674

Appearances:

E. B. TAYLOR, ESQ.,
Hailey, Idaho.

W. G. BISSELL, ESQ.,
Gooding, Idaho.

BRANCH BIRD, ESQ.,
Gooding, Idaho,
Attorneys for the Plaintiff

J. D. SKEEN, ESQ.,
Salt Lake City, Utah.

OSCAR W. WORTHWINE,
ESQ.,
Boise, Idaho.
Attorneys for Defendants.

OPINION

June 14, 1950

CLARK: District Judge.

The Plaintiff alleges in his amended complaint that he is, and was at all times mentioned in the complaint, a real estate broker licensed under the laws of the State of Idaho, with his principal place of business at Hailey, Idaho; that on April 29, 1948, the defendants listed with him a certain ranch, together with certain personal property thereon, which ranch and personal property are described in the contract appointing plaintiff to act as agent of defendants in procuring a buyer. This "listing" contract or contract of employment was in writing and is set out in full in the complaint. It provides for a commission of 5 per cent of the sale price of \$140,000.00, less \$1,000.00 or a total commission of \$6000.00. On May 15, 1948, the contract was modified to provide that the commission as stated in the original contract dated April 29, 1948, would be paid as follows:

"\$2,000.00 when the first \$25,000.00 is paid and \$2,000.00 when the second \$25,000.00 is paid, and the remaining \$2,000.00 when the full down payment of \$70,000.00 is paid on the purchase price of this Cove Ranch, making a total of \$6,000 Commission."

That while the contract was in effect the plaintiff procured purchasers who were able, ready and willing to purchase the listed property; that defendants entered into an agreement on May 11, 1948, with these purchasers, which agreement was satisfactory.

and agreeable to the defendants; and that thereafter, on August 12, 1948, this agreement was modified by a new written agreeemnt between the same parties. The original agreement and the modified agreement are set out in full in the complaint.

Plaintiff alleges further that upon the execution and delivery of the agreement dated May 11, 1948, the purchasers entered into possession of the real and personal property concerned, did certain work on the premises, made certain improvements, paid all taxes due, paid water assesments, and in general operated the property in accordance with the contract of sale existing between them and the defendants; that certain payments were made by the purchaser to defendants on the purchase price and certain credits on the accounts were given by the defendants to the purchasers, all in the total amount of \$31,983.93, these payment and credits being set out in detail in the complaint; and that said amount has been forfeited and paid or will be paid by the purchasers on account of the purchase price of the real and personal property; that hereafter and at the special instance and request of the defendants, and without the knowledge, consent or approval of the plaintiff, the defendants entered into an agreement with the purchasers whereby it was voluntarily and mutually agreed between the defendants and the purchasers that the contract of sale should be terminated and possession restored to the defendants. In other words, plaintiff alleges that the con-

tract of sale was cancelled without his knowledge or consent. Plaintiff further alleges that the defendants thereafter sold the property to some third person; that no part of plaintiff's commission of \$6,000.00 has been paid, though demand has been made upon the defendants on each of them for the payment thereof; wherefor plaintiff prays that he have judgment against the defendants, and each of them in the amount of \$6,000.00 with interest thereon at the rate of 6 per cent per annum from April 4, 1949, and for costs of suit.

In their answer to plaintiff's amended complaint, defendants make certain denials and certain admissions, but principally and substantially they admit that plaintiff was their agent in the purported sale of the property but allege they were wrongfully induced to sign the agreement making plaintiff their agent and they were wrongfully induced to sign the contract of sale, in that plaintiff made misrepresentations as to the ability of the purchasers to comply with the terms of the contract of sale. Specifically, defendants allege that plaintiff made misrepresentations in the following particulars: That on or about May 15, 1948, plaintiff represented to defendants that one of the purchasers, Oriel Randall, was the owner of a farm at Eden, Idaho, whereas the title to the farm was actually in the name of his deceased wife and the property was subject to a mortgage of approximately \$5,000.00 and parts of the farm were being purchased under con-

tract upon which there was a large amount unpaid; that plaintiff at the same time represented to defendants that another of the purchasers, Carl H. Randall, was the owner of a farm at New Plymouth, Idaho, which plaintiff exhibited to defendants as Carl H. Randall's farm, whereas he was not the owner of the farm exhibited or of any farm whatsoever; that plaintiff at the same time represented to defendants that another of the purchasers, Edward Randall, was the owner of a farm at Parma, Idaho, whereas the property was in fact subject to a mortgage of approximately one-half of its value; that plaintiff represented such farms to be free of mortgage indebtedness and proposed that the defendants sell the property here concerned to the purchasers and take, as security for the payment of approximately one-half of the purchase price thereof, the negotiable promissory note of each of the three purchasers for the sum of \$25,000.00 to be secured by a mortgage for the amount of the note on each of their respective farms; that defendants accepted the proposal because they believed, from the representations made by plaintiff, that the farms were free from indebtedness; that the purchasers agreed to execute and deliver mortgages on their farms; that they did not do so, although they went into possession of defendants' ranch and personal property immediately after signing the contract of sale. Defendants admit entering into the modified agreement, or contract of sale, on August 12, 1948, with

the purchasers; and admit the cancellation of the contract. They deny that any forfeitures were made by the purchasers and they allege that no profits were derived by the defendants from the transaction, and that on the contrary the defendants suffered damages by reason thereof.

Narrowed down, the issue in the case is this: Plaintiff claims his commission under his contract of employment, alleging that he procured bona fide purchasers and that a bona fide sale was made to these purchasers procured by him. Defendants admit that plaintiff was employed as their agent and that he procured purchasers, but allege that purported transaction was induced by material misrepresentations by the plaintiff, on which the defendants relied; that the representations were false and were known by plaintiff to be false or were made by the plaintiff in reckless disregard of the truth; that there was therefore no bona fide sale and the plaintiff did not earn a commission. The alleged misrepresentations related to the ability of the purchasers to furnish mortgages on the three farms as referred to earlier herein.

The evidence is conclusive that two of the purchasers, Oriel Randall and Edward Randall, did execute and deliver mortgages on their respective farms as agreed in the original contract of sale. These two mortgages are, in fact, still held by the defendants. It is also conclusive from the evidence

that by agreement dated August 12, 1948, the earlier agreement pertaining to the furnishing of mortgages by each of the three purchasers on their respective farms was modified by mutual agreement of the defendants and the purchasers to provide for certain other securities in lieu of the mortgage which, under the original agreement, Carl Randall was to have executed and delivered to the defendants. It cannot be doubted that by entering into this modified agreement the defendants acquiesced in the substitution of securities and waived any right they might have had to rescind the original contract of sale. In short, as late as the date of this modified agreement, August 12, 1948, defendants still regarded the Randall brothers as bona fide purchasers, "able, ready and willing" to buy the property. It must also be noted that at the time the contract of sale was cancelled by mutual agreement of the defendants and the purchasers, the purchasers were not in default on the contract in any respect, the only previous default having been waived by defendants as discussed above. It is clear from the evidence that the agreement to cancel the contract was entered into without the knowledge, consent or approval of the plaintiff.

There is some dispute as to how much was paid by the purchasers on the purchase price. Exhibits 14 and 15 show payments and credits totaling \$22,383.16; it would appear from other evidence to amount to well in excess of \$25,000.00.

The pertinent facts are that plaintiff was engaged by defendants, under a contract in writing, to sell certain property; that he procured purchasers, an agreement was entered into and later modified; that the purchasers went into possession of the property immediately following execution of the original agreement; that the purchasers made substantial payments on the purchase price, the exact amount of which is subject to dispute; that subsequently, and while the purchasers were not in default on their contract to purchase, the contract was cancelled with the mutual consent of defendants and purchasers and without the knowledge, consent or approval of the plaintiff.

The question before the Court is the rights of a real estate broker to his commission under the state of facts existing here. The general rule is that after a contract between the principal and a customer produced by the broker has been concluded, its subsequent modification or cancellation does not defeat or affect the right of the broker to a commission unless it is done at his request or with his consent or knowledge and acquiescence.

The Court is of the opinion that the plaintiff was free from misconduct in his dealings with the defendants, also if there was any misunderstanding the defendants acquiesced therein when they entered into the modified agreement with the purchasers after acquiring actual knowledge of the failure of

Carl Randall to deliver the mortgage on his farm, and any claims of misrepresentation were thereby waived, and that the case at bar falls within the general rule just stated. It is true that the contract of employment on which plaintiff relies provided for the payment of commissions pro-rata as the purchase price was paid and that \$2000.00 of the commission was to have been paid when \$25,000.00 was paid on the purchase price. If plaintiff's recovery were to be limited by this provision of the contract of employment, it would be of primary importance to determine exactly how much was actually paid in the form of cash and credits. However, the rule has been laid down that where a broker's contract with the owner provides for payment of commissions pro rata as the purchase price is paid, the broker is entitled to his entire commission upon cancellation of the owner's contract with the purchaser by mutual consent of the owner and purchaser when the contract is cancelled without any agreement with the broker, at least where the purchaser is not yet in default. *Ratzlaff v. Trainor-Desmond Co.*, 183 Pac. 269. This rule is applicable to the case at bar, for the defendants have abandoned their contract of sale and have made it impossible to carry out the contract with the purchasers procured by the plaintiff. The cancellation of the contract by mutual consent of the defendants and purchasers was no concern of the plaintiff. If he earned a commission at all, he earned it on the full price for which the prop-

erty was sold, and his commission could not be reduced by the subsequent transaction.

It is therefore immaterial as to what amounts have been paid or credited and are yet to be paid on the purchase price, except insofar as the payments and credits indicate the bona fide nature of the transaction and show that the purchasers were not in default at the time the contract was cancelled. Plaintiff is entitled to recover his full commission; interest will be allowed from date of judgment.

Counsel for Plaintiff will prepare findings of fact, conclusions of law and decree and serve copy on opposing counsel; submitting the original to the Court for approval.

No. 12653

United States
Court of Appeals
For the Ninth Circuit.

OAKLAND DOCK AND WAREHOUSE COM-
PANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

No. 12653

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In the United States District Court for the Northern
District of California, Southern Division

Civil Action No. 29820

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COM-
PANY,

Defendant.

COMPLAINT

The United States of America, by Frank J. Hennessy, United States Attorney for the Southern District of California, complains of the defendant and alleges:

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345.

2. Defendant Oakland Dock and Warehouse Company is a corporation duly organized and existing under the laws of the State of California with its principal place of business at 1401 Middle Harbor Road, Oakland, California.

3. By bill of sale dated June 1, 1949, plaintiff, acting through War Assets Administration, an agency of the United States, in the exercise of the powers vested in it by Reorganization Plan One of 1947 (12 F.R. 4534), and the Surplus Property Act of 1944, as amended (Act of October 3, 1944, 58 Stat. 765, as amended, 50 App. U.S.C. 1611, et

seq.), and in accordance with the provisions of the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225), sold, transferred, assigned and delivered to defendant certain industrial equipment, machine tools and tools, described in said bill of sale, upon the covenants, restrictions, conditions and reservations set forth in said bill of sale, including, among others, the following:

“1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the ‘plant,’ in which the above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

“2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years’ duration each.

“3. The Vendee for a period of ten (10) years from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other

severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of those machine tools or other severable production equipment as listed in Exhibit 'G' of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule 'A' and made a part hereof."

A copy of said bill of sale, together with "Schedule A" attached thereto, is marked Exhibit 1 and is attached to this complaint.

4. Defendant accepted delivery and acquired title to said personal property subject to all the covenants, conditions, restrictions and reservations set forth in said bill of sale.

5. Prior to the execution of said bill of sale, said personal property had been designated by letter dated May 7, 1948, to the War Assets Administration from the Director for Industrial Programs, Munitions Board of the National Military Establishment, as necessary for the national defense to be disposed of under the national security clause. A copy of said letter is marked Exhibit 2 and is attached to this complaint. By the terms of the National Industrial Reserve Act of 1948 said per-

sonal property is a part of the national industrial reserve.

6. Defendant, notwithstanding the covenants, restrictions, conditions and reservations set forth in said bill of sale and in violation of the terms thereof, has sold and disposed of certain of said machine tools and items of industrial equipment to third persons without the written consent of the Secretary of the Navy (the Navy Department being the department which has jurisdiction over said personal property); and defendant will, unless restrained by order of this Court, sell and dispose of additional items of said machine tools and industrial equipment. The machine tools and items of industrial equipment already sold and disposed of by defendant and which will be sold and disposed of by defendant unless restrained by order of this Court did not and will not consist of those machine tools and items of equipment listed in "Schedule A" attached to said bill of sale. The sale and disposition of such machine tools and items of industrial equipment by defendant has already materially reduced the capacity of the plant to produce the items for which it was designed, and the further sale and disposition of additional machine tools and items of industrial equipment which defendant will undertake, unless restrained by order of this Court, will further materially reduce the capacity of the plant to produce the items for which it was designed. Defendant has not, does not propose to, and will not make replacement of equivalent machine tools and items of industrial equipment in

lieu of those which defendant has sold and disposed of and which defendant will sell and dispose of unless restrained by order of this Court.

7. The sale and disposition by defendant of said machine tools and items of industrial equipment will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948.

Wherefore Plaintiff prays:

(1) That this Court issue a temporary restraining order restraining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale (other than the items of personal property listed in "Schedule A" attached to said bill of sale) without the written consent of the Secretary of the Navy.

(2) That this Court issue a preliminary injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale (other than the items of personal property listed in "Schedule A" attached to said bill of sale) without the written consent of the Secretary of the Navy.

(3) That this Court issue a permanent injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale (other than the items of

personal property listed in "Schedule A" attached to said bill of sale) without the written consent of the Secretary of the Navy.

(4) That defendant be required to pay to plaintiff such damages as plaintiff has sustained from defendant's wrongful sale and disposition of items of personal property acquired by defendant under said bill of sale.

(5) That plaintiff have such other and further relief as is just.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ ROBERT H. PECKHAM,
Assistant United States
Attorney.

(Here follows Schedule "A," part of Exhibit 1-15 photostat pages.)

EXHIBIT No. 1

Moore Drydock Co.
Oakland, Calif.
M-Calif-174

Bill of Sale

For and in Consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, and other good and valuable considerations, receipt of which are hereby acknowledged, and the covenants, restrictions, conditions and reservations hereinafter contained, the United States

of America, acting by and through War Assets Administration under and pursuant to Reorganization Plan One of 1947 (12 F. R. 4534) and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765) and WAA Regulation No. 1 as amended, Vendor, does hereby sell, transfer, assign and deliver unto Oakland Dock and Warehouse Company, a corporation duly organized and existing under the laws of the State of California, Vendee, the following described chattels:

All that certain personal property located on that portion of the Moore Drydock Company West Yard, Oakland, California, comprising 52.69 acres, more or less, as owned by the United States of America and conveyed to Vendee by quitclaim deed of even date, the same being more specifically described in WAA-4 Folders Numbered 1, 2, 2a, 3, 3a, 4, 5, 6, 7, 8, 9, 10, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 12, 13, 14, 15, 16, 17, 18, 19, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, 20-9, 21, 22-1, 22-2, 22-3, 22-4, 22-5, 22-6, 22-7, 22-8, 22-9, 23, 24, 25, 26, 27 and 28.

Said chattels were duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and WAA Regulation No. 1 as amended.

To Have and to Hold the same unto the said Vendee, its successors and assigns, without representation of warranty, express or implied, as to the

title or condition thereof, subject to the following covenants, restrictions, conditions and reservations:

1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the "plant," in which the above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each.

3. The Vendee for a period of ten (10) years from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of these machine tools or other

severable production equipment as listed in Exhibit "G" of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule "A" and made a part hereof.

4. The Vendee, for said period of ten (10) years, will preserve, protect and maintain the machinery, machine tools and equipment as hereinabove described, in said plant in the same condition of repair in which they are received by Vendee, and Vendee may move any machinery, machine tools and equipment as hereinabove described from their present locations or foundations within the plant and store in other parts of said plant or in wooden structures on the property, included therein, and it is agreed that machinery, machine tools and equipment which are not readily severable may be so moved by Vendee, by dismantling and so storing in their severable parts. It is further agreed that parts rendered worthless in such dismantling operations, such as brick work, may be scrapped and that foundations may be removed. It is understood that there will be some unavoidable aging of the machinery, machine tools and equipment placed in such storage and that the machinery, machine tools and equipment used by the Vendee will be subject to reasonable wear and tear, and the above provision relative to maintenance in the condition received by Vendee is so qualified. Subject to the foregoing provisions, the Vendee will so preserve, protect and maintain said machinery, machine tools and equipment as above

prescribed that the same can be put into efficient operation for their intended defense use in the shortest possible time, but in no case in excess of one hundred and twenty (120) days.

5. The Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which has the jurisdiction, shall have the right to conduct an inspection or survey of said machinery, machine tools and equipment at any time upon prior written notice thereof to the Vendee.

6. When, in the opinion of the appropriate Secretary, the Vendee fails to comply with the obligations prescribed herein, the Vendor shall have the right to take full possession of said machinery, machine tools and equipment, and to take such action as may be necessary to remedy the Vendee's default. All costs incidental to taking possession of said machinery, machine tools and equipment under these circumstances and of the work performed or action taken under the direction of the Vendor, shall be borne by the Vendee. Upon completion of such work, possession of said machinery, machine tools and equipment will be returned to the Vendee, unless in the interim the Vendor shall have activated the dormant estate mentioned above.

Vendee herein has certified, and by acceptance of this bill of sale agrees for itself, its successors and assigns that it has received delivery of all of the chattels as hereinabove described.

In Witness Whereof, Vendor has caused this

instrument to be executed this first day of June, 1949.

UNITED STATES OF
AMERICA,

Acting by and Through War
Assets Administration.

By /s/ ROBERT B. BRADFORD,
Regional Director, Region 10, San Francisco,
California.

State of California,
City and County of San Francisco—ss.

On this 21st day of June, 1949, before me, Maude C. Phelps, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Robert B. Bradford, known to me to be the Regional Director, War Assets Administration, Region 10, San Francisco, California, and known to me to be the person who executed the within instrument on behalf of said War Assets Administration, which executed said instrument on behalf of the United States of America, and acknowledged to me that he subscribed to the said instrument the name of the United States of America and the name of the War Assets Administration on behalf of the United States of America, and further that the United States of America executed said instrument.

Witness my hand and Official Seal.

[Seal] /s/ MAUDE C. PHELPS,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Sept. 21, 1952.

EXHIBIT No. 2

National Military Establishment
Munitions Board
Washington

Refer to
MB 004

7 May 1948

Mr. Marshall L. Godman
Deputy Administrator
Office of Real Property Disposal
War Assets Administration
Washington 25, D. C.

Dear Mr. Godman:

Reference is made to a directive issued by Doctor Steelman, on April 8, 1948, suspending the sale of industrial facilities in your inventory for thirty days during which time the Military Establishment was to check these facilities to determine whether or not any of them should be disposed of under the terms of the National Security Clause.

There is attached hereto a tentative list of one hundred fourteen facilities now considered necessary for the National Defense, and, as a conse-

quence, should be disposed of under the National Security Clause conditions. Studies are continuing with regard to the facilities on this tentative list and it is anticipated that within approximately thirty days certain deletions may be possible. The Military Departments expect to conduct field checks on the physical condition of most of these facilities; therefore, it is requested that your field organization be asked to cooperate by permitting them to make a physical inspection of these properties.

Sincerely yours,

/s/ P. W. TIMBERLAKE,

Major General, USAF.

1 Incl:

List of plants

(6 pages)

Plants to Be Added to the National Security
Clause List

4 May 1948

Continental Foundry and Machine Company

Coraopolis, Pennsylvania (RFC-owned, Plancor 294)

Denver Ordnance Plant

Denver, Colorado (Army)

Scullin Steel Company

St. Louis, Missouri (RFC-owned, Plancor 1672)

Utah General Sub-Depot

(Utah Ordnance Plant), Salt Lake City, Utah
(Army)

Huntsville Arsenal

Huntsville, Alabama

Symington-Gould Corporation

Army-owned, Depew, New York

Revere Copper & Brass Company

Plancor 91, Chicago, Illinois

Aircraft Service Corporation

Valley Stream, L. I., New York

Air Reduction Sales Company, Inc.

Gloucester, New Jersey

Aluminum Company of America

Riverbank, California

Aluminum Company of America

Heath (Newark), Ohio

Atlantic Steel Casting Company

Crum Lynn, Pennsylvania

Curtiss-Wright Corporation

Kenmore, New York

Emerson Electric Mfg. Company

St. Louis, Missouri

Farm Crop Processing

Omaha, Nebraska

Grain Processing Corporation

Muscatine, Iowa

Howard Foundry Company

Chicago, Illinois

Mohawk Petroleum

Bakersfield, California

National Distillers Products

Kansas City, Missouri

National Smelting Company

Cleveland, Ohio

Northwestern Aeronautical Corporation

St. Paul, Minnesota

Pesco Products, Inc.

Cleveland, Ohio

Republic Aircraft Products Div.

Detroit, Michigan

Sealed Power Corporation

Muskegon, Michigan

Solar Aircraft Company

Des Moines, Iowa

Standard Oil Company of N. J.

Baton Rouge, Louisiana, 1065

Standard Oil Company of N. J.

Baton Rouge, Louisiana, 1526

Standard Oil Company of N. J.

Baton Rouge, Louisiana, 1868

Studebaker Corporation

Chicago, Illinois

Timkin Roller Bearing Company

Columbus, Ohio

Waco Aircraft Company
Troy, Ohio

Willamette Valley Wood Chemical Co.
Eugene, Oregon

Wilshore Oil Company
Norwalk, California

Wright Aeronautical Company
Paterson, N. J. (South Portion)

Air Reduction Sales Co., Inc.
Baltimore, Maryland. Plancor 1400

Alabama Drydock & Shipbuilding Co.
Mobile, Alabama. Nobs-77

Aluminum Company of America
Maspeth, New York. Plancor 226-A1

Aluminum Company of America
Trentwood, Washington. Plancor 524, Plancor 1061

Aluminum Company of America
McCook (Chicago), Illinois. Plancor 652

Aluminum Company of America
New Castle, Pennsylvania. Plancor 1148-1 (F-9)

Aluminum Company of America
Kansas City, Missouri. Plancor 1214

American Cyanamid Chemical Corp.
Fort Worth, Texas

Asbestos Limited, Inc.
Millington, New Jersey

Associated Shipbuilders

(Formerly Puget Sound Br. & Dredg.), Seattle,
Washington

Barium Stainless Steel Company

Lorain (Canton), Ohio. Plancor 709

Barnes, W. F. & John (Bldg. #31)

Rockford, Illinois. Plancor 67

Bendix Aviation Corporation

(Plants 4 and 5), Plancor 14, South Bend,
Indiana

Bendix Aviation Corporation

Teterboro, New Jersey. Plancor 132

Bendix Aviation Corporation

South Bend, Indiana. Plancor 171

Benjamin Franklin Graphite Co.

Chester Springs, Pennsylvania. Plancor 1254

Bethlehem Fairfield Shipyard

Baltimore, Maryland. MC-10676

Buffalo Brake Beam Company

Buffalo, New York. Plancor 1773

Charleston Shipbuilding & Drydock

Charleston, South Carolina. Nobs-6

Columbia Broadcasting Company

Delano, California. Plancor 1985

Commercial Iron Works

Portland, Oregon. Nobs-75 and 489

Consolidated Steel Corporation

Wilmington, California. MC

Consolidated Steel Corporation

San Francisco, California. NOd-1780, MC-10605

Copperweld Steel Company

Warren, Ohio. Plancor 333.

Copperweld Steel Company

Warren, Ohio. Plancor 334

Copperweld Steel Company

Warren, Ohio. Plancor 383

Copperweld Steel Company,

Warren, Ohio. Plancor 1130

Crucible Steel Company of America

Midland, Pennsylvania. Plancor 466

Delta Shipbuilding Company

New Orleans, Louisiana. MC-45024

Domestic Manganese & Dev. Co.

Butte, Montana. Plancor 1804

Dow Chemical Company

Bay City, Michigan. Plancor 988

DuPont de Nemours & Co., E. I.

Leomister, Massachusetts. Plancor 1273

Eagle Pitcher Mining & Smelting Co.

Henryetta, Oklahoma. Plancor 1023

Eaton Manufacturing Company

Saginaw, Michigan, Plancor 787

Eaton Manufacturing Company

Cleveland, Ohio. Plancor 800

Electric Auto Lite Company

Cincinnati, Ohio. Nord 1229

Fairchild Engine & Aircraft Corp.

(Firestone Tire & Rubber Co.) Pl. 506. Burlington, North Carolina

General American Transportation Corp.

(Jacksonville Oil Terminal) Pl. 1595-A. Jacksonville, Florida

General Cable Corporation

Perth Amboy, New Jersey. Plancor 735

General Motors Corporation

Kings Mills, Ohio. NObs 1599

Globe Union, Inc.

Milwaukee, Wisconsin. Nobs 59

Goodyear Synthetic Rubber Corp.

Akron, Ohio. Plancor 126

Hegeler Zinc Company

Hegeler, Illinois. Plancor 971

Hughes Tool Company

Houston, Texas. Plancor 143

Hurley Marine Works, Inc.

Oakland, California. NObs-723

Jack Heinz, Inc.

Bedford, Ohio. Plancor 114

Jack & Heinz Inc.

Bedford, Ohio. Plancor 1188

Jones Construction Co., J. A.

(Wainwright Shipyard), MC-45021. Panama City, Florida

Kaiser Shell Plant

Fontana, California

Kaiser Swan Island Shipyard

Portland, Oregon. MC-70602

Keuffel & Esser Company

Hoboken, New Jersey, NOrd-1023

Marietta Manufacturing Company

Point Pleasant, W. Virginia. NObs-387

Marin Shipbuilding Company

Sausalito, California. MC-70583

McDonnell Aircraft Corporation

Memphis, Tenn. Plancor 813

Moore Drydock Company

Oakland, California. MC-70588

National Carbide Corporation

Ashtabula, Ohio. Plancor 1166

National Supply Company

Toledo, Ohio. NObs-419

New England Shipbuilding Corp.

South Portland, Maine. MC-10801

Ohio Steel Foundry Company

Lima, Ohio. Plancor 875

Oregon Shipbuilding Corp.

Portland, Oregon. MC

Otis Elevator Company

Buffalo, New York. WD-332

Pendleton Shipyard Company

New Orleans, Louisiana. NObs-1096

- Pittsburgh Steel Foundry Company
Glassport, Pennsylvania. Plancor 659
- Pullman Standard Car Mfg. Co.
Chicago, Illinois. Plancor 104
- Pullman Standard Car Mfg. Co.
Chicago, Illinois. Plancor 391
- Republic Steel Corporation
Warren, Ohio. Plancor 1514
- Scullin Steel Company
St. Louis, Missouri. Plancor 299
- Sun Shipbuilding & Drydock
Chester, Pennsylvania. MC-10835
- Todd Houston Shipbuilding Corp.
Houston, Texas. MC-40523
- U. S. Rubber Company
Los Angeles, California. Plancor 611-A
- Victoreen Instrument Company
Cleveland, Ohio. Plancor 1975
- Warner Company
Devault, Pennsylvania. Plancor 1238
- Wenatchee Alloys, Inc.
Wenatchee, Washington. Plancor 747
- Westinghouse Electric & Mfg. Co.
Landsdowne, Maryland. Plancor 474
- Willamette Iron & Steel Company
Portland, Oregon. Plancor 50
- Willamette Iron & Steel Company
Portland, Oregon. Plancor 772

Willamette Iron & Steel Company
Portland, Oregon. Plancor 1956

Willys Overland Motors Company
Toledo, Ohio. Plancor 383

Wyman-Gordon Company
Worcester, Mass. Plancor 715

Youngstown Sheet & Tube Company
Indiana Harbor, Indiana. Plancor 328

War Assets Administration

Memorandum

Following is the text of a statement issued by
the Assistant to the President on April 8, 1948:

April 8, 1948

(Copy)

Immediate Release

Statement by the Assistant to the President

After consultation with the Secretary of Defense, the Chairman of the National Security Resources Board, the Chairman of the Munitions Board, and the Administrator of the War Assets Administration, I have requested the War Assets Administration to withhold for a thirty-day period final disposal action on all unsold industrial plants, including machine tools and other production equipment therein, not already covered by the National Security Clause. The National Security Clause is a condition of sale contract which stipulates that the plant must be maintained in condition such that it

can be reconverted to its original use on 120 days notice.

Under the provisions of Public Law 364, the Munitions Board has imposed the National Security Clause on more than 150 plants. The plants selected were those considered most important for national defense purposes. The purpose of the present action is to permit the Munitions Board to review the status and condition of each of the remaining, unsold plants with a view to imposing the restrictions of the National Security Clause on subsequent sales where appropriate under current conditions.

Some of these plants have long since been cannibalized (i.e., sold piece by piece to different buyers) or have otherwise deteriorated to the point where it would not be practicable to impose the National Security Clause. In the case of other plants which are in reasonably good condition, the Munitions Board may determine that it is not desirable or necessary to impose the National Security Clause. In some cases however, the clause will be imposed.

In this review of the status and condition of these plants, top priority will be given to plants where negotiations for disposal are in an advanced stage. In all cases, the War Assets Administration will continue negotiations but will refrain from final disposal action until a determination with respect to the plant is made by the Munitions Board during this thirty-day period.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE

The Secretary of Defense has the authority to designate, as part of the National Industrial Reserve, plants which are to be disposed of as surplus property.

The National Industrial Reserve is defined as "that excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a national security clause, * * *."

Section 3(a) of the National Industrial Reserve Act of 1948, PL 883, 80th Congress, active July 2, 1948, 62 Stat. 1225.

The national security clause is defined as those terms, conditions, restrictions, and reservations, heretofore formulated or as may be formulated for insertion in instruments of sale or lease of property determined to be a part of the national industrial reserve, which will guarantee the availability thereof for such purposes as deemed necessary by the Secretary of Defense.

Section 3(c) of the National Industrial Act of 1948 as cited above.

The authority of the Secretary of Defense under the National Industrial Act has been delegated to the Munitions Board.

Memorandum for the Chairman of the Munitions Board dated July 3, 1948.

Any sale, or offer to sell a plant, its equipment or machinery by a purchaser from the government under a bill of sale containing a national security clause is in violation of the provisions of the National Industrial Reserve Act unless the written consent of the Secretary of Defense or the secretary of the appropriate branch of the armed services is first obtained.

The National Industrial Reserve Act of 1948 as cited above.

Any sale of a plant or its equipment or material in the industrial reserve without the written consent of the appropriate secretary of the department of defense will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNC-
TION

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

John Rauly, being first duly sworn, deposes and says:

I am the Assistant to the Deputy Assistant Industrial Manager, Captain Mario Vangeli, of the Bureau of Ships, Department of the Navy, assigned to the Field Office of the Bureau of Ships at San Francisco, California. It is the duty of the field office of the Bureau of Ships to conduct inspections of industrial reserve plants designated as such by the Munitions Board of the Department of Defense and located in the San Francisco Bay Area.

The Oakland Dock and Warehouse plant, formerly the Moore Drydock West Yard, located at Oakland, California, is one of the industrial reserve plants within the San Francisco Bay Area. This plant, a shipyard, was originally sponsored by the United States Maritime Commission, and during the war the Moore Dry Dock Company constructed various types of vessels therein. At the end of the war, the plant and its equipment and machinery was declared surplus by the Maritime Commission and turned over to the Surplus Prop-

erty Administration, later the War Assets Administration, for disposal. By letter dated May 7, 1948, from Major General P. W. Timberlake, Director for Industrial Programs, Munitions Board, a copy of which is annexed to the complaint filed herein and served herewith as Exhibit 2, the War Assets Administration was informed that this plant, its equipment and machinery, was to be disposed of subject to the National Security Clause. (Sec. 3(c) of National Industrial Reserve Act of 1948 P.L. 883, 80th Congress.) The Annual Reports of the Munitions Board to Congress on the National Industrial Reserve, dated April 1, 1949, and April 1, 1950, shows the Moore Dry Dock West Yard as in the National Industrial Reserve (1949 Report, page 102; 1950 Report, page 101). Section 3(a) of the above cited National Industrial Reserve Act defines the term "national industrial reserve" to mean that excess industrial property which has been sold, leased, or otherwise disposed of by United States, subject to the National Security Clause.

The War Assets Administration has sold to Oakland Dock and Warehouse Company, defendant herein, certain industrial equipment, machine tools and tools, described in the bill of sale annexed to the complaint filed herein and served herewith as Exhibit 1, upon the terms, conditions and reservations set forth in the said bill of sale. These terms, conditions and reservations (Page 3 to 6 of the bill of sale) set forth various restrictions on the machinery and equipment under the National Security Clause.

Paragraph No. 3 of the restrictions set forth in the said Bill of Sale states that the purchaser for a period of ten years from the date of the bill of sale will not, without the written consent of the Secretary of the Navy, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described in said bill of sale, the loss of which would materially reduce the capacity of the plant to produce the items for which it was made unless replacement is made by equivalent machine tools or other severable production equipment.

Notwithstanding the restrictions contained in paragraph 3 of said Bill of Sale, the defendant has sold and disposed of certain of said machine tools and items of industrial equipment to third persons without the written consent of the Secretary of the Navy. In a letter of William H. Neblett, dated May 26, 1950, to the Assistant Secretary of the Navy, Washington, D. C., Mr. Neblett, as attorney for the defendant, states on page 1 that machine tools and equipment were being sold by the defendant and that "since May 4th the company has sold some additional equipment which was released by the General Services Administration on May 8, 1950." Affiant is informed and believes that the defendant will sell and dispose of additional items of said machine tools and industrial equipment. The defendant has widely publicized and advertised the sale of items of machinery, equipment and tools included in the bill of sale and subject to the restrictions of paragraph 3 thereof in

the public press. (San Francisco Chronicle of May 24, 1950, World Trade Supplement, at page 17, and San Francisco Examiner of May 14, 1950.) On Page 3 of the said letter from William H. Neblett to the Assistant Secretary of the Navy, Mr. Neblett states: "Until these well established points of law applicable to bills of sale and chattel mortgages have been answered satisfactorily to us, we shall proceed with the sale of such machinery, tools and equipment as we desire to sell."

The machine tools and items of industrial equipment already sold and disposed of by defendant, and which affiant is informed and believes will be sold and disposed of by defendant unless restrained by order of this Court, has already materially reduced the capacity of the plant to produce the items for which it was designed, and further sale and disposition of additional machine tools and items of industrial equipment, which affiant is informed and believes defendant will undertake unless restrained by order of this Court, will further materially reduce the capacity of the plant to produce the items for which it was designed.

The machine tools and items of industrial equipment already sold and disposed of by defendant, and which affiant is informed and believes will be sold and disposed of by defendant unless restrained by order of this Court, are subject to the restrictions of paragraph 3 of the Bill of Sale as set forth above.

/s/ JOHN RAULY.

Subscribed and sworn to before me this 8th day of June, 1950.

/s/ LOUIS N. DESMOND.

[Seal of the District Court.]

[Endorsed]: Filed June 8, 1950.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 29820

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COM-
PANY,

Defendant.

TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE

Upon the reading of the affidavit of John Rauly, Assistant Industrial Manager of the Bureau of Ships of the Department of the Navy, and the points and authorities filed herewith, and it appearing therefrom that this is a proper case for the issuance of a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint be granted, great and irreparable injury will result to plaintiff, as hereinafter

set forth, before the matter can be heard on notice; and

It appearing that the defendant, notwithstanding the restrictions contained in paragraph 3 of the Bill of Sale annexed to the complaint on file herein, will, unless restrained by order of this Court, sell and dispose of additional items of machine tools and industrial equipment located at the Oakland Dock and Warehouse Company plant, Oakland, California, in violation of the National Security Clause contained in said Bill of Sale, pursuant to Section 3-c of the National Industrial Reserve Act of 1948 (Public Law 883, 80th Congress); and

It further appearing that the sale and disposition of such machine tools and items of industrial equipment by the defendant, unless restrained by order of this Court, will further materially reduce the capacity of the said plant, which has been designated by the Munitions Board of the Department of the Defense of the United States as an industrial reserve plant, to produce the items for which it was designated; and

It further appearing that the sale and disposition by defendant of machine tools and items of industrial equipment listed in said Bill of Sale will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225);

It Is Therefore Ordered, that pending the hearing on the hereinafter mentioned order to show cause, the defendant, their agents, servants, employees,

lessees and attorneys, collectively and individually, and all persons having knowledge of this order, and each of them, are enjoined and restrained and ordered as follows:

(1) From selling, delivering, contracting to sell, offering to sell, or otherwise disposing of any of the personal property acquired by plaintiff under said Bill of Sale (other than the items of personal property listed in "Exhibit G" of "Schedule A," attached to said Bill of Sale, annexed to the complaint on file herein) without the written consent of the Secretary of the Navy;

(2) From completing any sales herinbefore commenced of the said personal property acquired by defendant under said Bill of Sale, and from executing and delivering any Bill of Sale to any purchaser for the purchase of any property listed in the said Bill of Sale annexed to the complaint on file herein, other than items mentioned in "Exhibit G" of "Schedule A."

It Is Further Hereby Ordered, for the reasons above set forth and for the further reason that this temporary restraining order has been granted without prior notice of the motion therefor, that the same shall expire at the hour of 12:00 p.m. on the 16th day of June, 1950, unless prior thereto, for good cause shown, this order is extended in accordance with the provisions of Rule 65, Subdivision (b) of the Federal Rules of Civil Procedure.

It Is Further Ordered, that the defendant hereinabove named be and appear before this Court on the 16th day of June, 1950, at the hour of 10:00 a.m., then and there to show cause, if any they have, why they, their agents, servants, lessees, attorneys and employees, should not be enjoined and restrained and ordered, during the pendency of this action, from doing any of the acts and things hereinabove mentioned and complained of in plaintiff's said complaint, in accordance with the prayer thereof.

Dated: June 8th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed June 8, 1950.

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, Oakland Dock and Warehouse Company, and for its answer to the complaint herein, admits, denies and alleges, as follows:

I.

For its answer to Paragraph 3 of the complaint defendant admits all of the allegations therein except that it denies that the Bill of Sale was made or that the property described therein was sold, transferred, assigned or delivered to it in accord-

ance with the provisions of the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Statute 1225); defendant denies that the Government made a conditional sale of the chattels described in the Bill of Sale to defendant; on the contrary, defendant alleges that the Government by said Bill of Sale made an absolute transfer of all its right, title and interest in and to the chattels to the defendant.

II.

For its answer to Paragraph 4 of the complaint defendant denies that there are any covenants, conditions, restrictions or reservations set forth in the Bill of Sale which in any way affect or limit the absolute title to the chattels transferred to it.

III.

For its answer to Paragraphs 5, 6 and 7 of the complaint defendant denies generally and specifically each and every allegation contained therein.

Wherefore, defendant having fully answered the complaint herein, prays that the complaint be dismissed and that it go hence with its costs incurred herein.

/s/ WILLIAM H. NEBLETT,
Attorney for Defendant.

District of Columbia—ss.

Jules J. Agostini, Jr., being by me first duly sworn, on his oath deposes and says:

That he is the President of Oakland Dock and Warehouse Company, a corporation, defendant

herein; that he makes this affidavit on behalf of said defendant; that he has read the foregoing Answer of defendant and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters, he believes the same to be true.

/s/ JULES J. AGOSTINI, JR.

Subscribed and Sworn to before me, a Notary Public in and for the District of Columbia, this 13th day of June, 1950.

[Seal] /s/ LILLIAN C. HANABLE,
Notary Public.

My Commission Expires February 14, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

As a part of its response to the order to show cause herein, defendant will move the Court at 10:00 a.m., June 16, 1950, the time at which the order to show cause comes up for hearing, to dismiss the complaint herein. The grounds of the motion will be that:

1. The complaint does not, nor does any part

thereof, state a cause of action against the defendant.

2. The action is one sounding in damages when no damages are alleged in the complaint.

3. The complaint seeks an injunction to prevent an alleged breach of contract.

4. The complaint shows on its face that the machinery, tools and equipment described therein are excess industrial property but that they have not been designated by the Secretary of National Defense as a part of the Industrial Reserve.

5. The complaint shows on its face that the Secretary of Defense did not designate the excess industrial property described in the complaint for disposal subject to the provisions of the National Security Clause.

6. It appears from the complaint that the consent of the Secretary of Defense to bring this suit has not been given.

/s/ WILLIAM H. NEBLETT,
Attorney for Defendant.

William H. Neblett certifies that in his opinion the foregoing motion is well taken and that it is **not interposed for delay.**

/s/ WILLIAM H. NEBLETT.

Points and Authorities

I.

The Secretary of Defense is the only officer authorized to determine what excess industrial property shall be placed in the National Industrial Reserve, or to designate what excess industrial property shall be disposed of subject to the provisions of the National Security Clause.

Section 4(1)(4) Public Law 883.

II.

The Bill of Sale conveys all right, title and interest of the Government in the chattels to the defendant, vendee. The attempt in paragraph 3 of the Bill of Sale to impose a restraint on alienation is void.

California Civil Code, Section 711.

Murray vs. Green,

64 Cal. 363, 28 Pac. 118;

Barnell vs. McLaughlin,

173, Cal., 213, 159 Pac. 590;

Los Angeles Investment Co. v. Gary,

181 Cal., 680, 186 Pac. 596;

Title Guaranty & Trust Co. v. Garrott,

42 Cal. App. 152, 183 Pac. 470.

III.

The property is in California; therefore, it is governed by the laws of that state.

Columbia Railway, Gas & Electric Co. v.
South Carolina,

261 U. S. 238, 43 Sp. Ct. Rept. 306;

Fitzgerald v. County of Modoc,
164 Cal., 494, 129 Pac. 794, 44 LRA (N.S.)
1229;

Thompson v. Magnolia Pipe Line Co.,
309 U. S. 476 60 Sp. Ct. Rep. 628;

Los Angeles and Salt Lake Ry. Co. v. U. S.,
(CCA 9th Cir.) 140 Fed. 2d 438.

IV.

The Bill of Sale does not have a security clause.
The sale of the machinery by the Government to
the Vendee was a simple commercial transaction.

Section 3(c), Public Law 883.

Standard Oil Co. of N. J. vs. United States,
267 U. S. 76, 69 L. Ed. 519.

/s/ WILLIAM H. NEBLETT,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

[Title of District Court and Cause.]

COUNTER-AFFIDAVIT OF JULES J. AGOSTINI, JR., IN REPLY TO AFFIDAVIT OF JOHN RAULY

District of Columbia—ss.

Jules J. Agostini, Jr., being first duly sworn, on his oath deposes and says that:

I.

Affiant is the President of defendant, Oakland Dock and Warehouse Company, hereinafter called Corporation, having been elected to that office by the Board of Directors of the Corporation May 10, 1949, and he makes this affidavit on behalf of the Corporation.

Affiant is 42 years old and was born in Berkeley, California, and has lived in California all his life; his residence is 2491 Ellsworth Street, Berkeley, California.

Affiant denies that Oakland Dock and Warehouse Company's property was formerly Moore Drydock, West Yard or that it is one of the Industrial Reserve plants; he denies that the plant is a shipyard or that it was originally sponsored as such by the United States Maritime Commission or that during the war Moore Drydock Company constructed various types of vessels therein; he denies that by letter dated May 7, 1948, from Major General P. W. Timberlake, USAF, Director of Industrial Programs, Munitions Board, copy of which is annexed to the complaint filed herein as Exhibit 2, the War

Assets Administration was informed that the personal property sold, transferred and delivered to the Corporation by the Bill of Sale dated June 1, 1949, attached to the complaint as Exhibit 1, was to be disposed of subject to the National Security Clause (Section 3(c) of the National Industrial Reserve Act of 1948, Public Law 883, 80th Congress); affiant denies that the annual reports of the Munitions Board to Congress on the National Industrial Reserve, dated April 1, 1949, and April 1, 1950, or either of them, show that the real or personal property sold, conveyed and delivered to the Corporation is, or are in the National Industrial Reserve; he denies that there are conditions or reservations set forth in the Bill of Sale which impose restrictions or restraints upon the absolute title to the machinery and equipment sold, transferred and delivered to the Corporation by the Bill of Sale.

Affiant admits that at his direction William H. Neblett, Counsel for the Corporation, wrote the letter dated May 26, 1950, referred to and quoted in part on Pages 3 and 4 of the affidavit of Mr. John Raully, a true copy of which letter is as follows:

The Assistant Secretary of the Navy
Navy Building
Washington, D. C.

May 26, 1950

My dear Mr. Secretary:

Your telegram of May 25th, 251650Z, was received yesterday. Although it appears from Public Law 883, 80th Congress, and the Bill of Sale and Chattel

Mortgage dated June 1, 1949, that the Secretary of Defense is the only person authorized to make the demand which the Navy Department has made upon the Company in its two telegrams of May 20th and May 25th, the Company, as a matter of courtesy, is glad to furnish you with the information which you request in your second telegram.

Morgan v. U. S.,

298 U. S. 468, 56 Sup. Ct. 906;

Morgan v. U. S.,

304 U. S. 1, 58 Sup. Ct. 773.

You are mistaken when you say that the Department has no knowledge of any consent having been given by the Government for sale of the machinery, tools and equipment which the Company has sold. There have been seven (7) partial releases signed by General Services Administration, releasing from the chattel mortgage the machinery, tools and equipment described in the partial releases. Those releases were given by GSA with full knowledge that the machinery, tools and equipment released had been sold. Besides, frequent inspections have been made of the plant by the Navy Department. The inspecting representatives of the Navy then learned that machinery, tools and equipment were being sold. Three of these inspectors were Mr. Lally of the Bureau of Ships, Mr. Clark and Mr. Miller of the Twelfth Naval District. On May 5th, Mr. Raully of the Industrial Management Division, Twelfth Naval District, called on Mr. Agostini, the President of the Company, at the Company's office

in Oakland, and was told that certain of the machinery, tools and equipment had been sold and released from the chattel mortgage and that the remainder of the chattels would be sold as and when the Company deemed their sale advisable. Mr. Rauly requested and was given at the time, copies of all of the partial releases made up to that time. They were six (6) in number, dated November 14, 1949, February 3, 1950, March 10, 1950, April 6, 1950, May 1, 1950, and May 4, 1950. Since May 4th the Company has sold some additional equipment which was released by GSA on May 8, 1950. A copy of that release is enclosed herewith. All seven of these releases were recorded in the County Recorder's Office, Alameda County, California. We are informed by GSA, San Francisco Regional Office, that in each case a copy of the release was forwarded by it to the Munitions Board, of which the Assistant Secretary of the Navy is a member.

You are in error when you say that the Company has been repeatedly informed that it is prohibited by the Bill of Sale from the sale of the machinery, tools and equipment. Neither the Company, nor any of its agents or attorneys have received any such information. We ask that you inform us of the names, dates and places when the Government claims that such information was given to the Company.

On the other hand, the Company did on September 7 and 9, 1949, inform, in writing, the Secretary of Defense, the Chairman of the Munitions Board, the Departments of Army, Navy and Air,

with numerous citations of authority to support its position, that there was no estate or interest in the machinery, tools and equipment reserved by the Government in its Bill of Sale to the Company. This information was repeated in writing more than a dozen times between September 9, 1949, and February 28, 1950. Because the Government failed to raise any objection to this stand of the Company's, naturally, it was assumed that the Government agreed with our construction of the Bill of Sale that it did not reserve any interest in the Government and did not prohibit the sale of the machinery, tools and equipment. This correspondence from the Company and the briefs which it filed on this subject are in the files of the several Departments of the Government mentioned. The only objection which the Navy Department raises in its telegrams to the sale of the machinery, tools and equipment is found in Paragraph 3 of the Bill of Sale. The Bill of Sale recites that the Government "does hereby sell, transfer, assign and deliver to the Oakland Dock & Warehouse Company" all of the machinery, tools and equipment therein described. The Bill of Sale was a transfer of complete title to the Company. The condition against alienation in Paragraph 3 is invalid.

"Conditions restraining alienation, when repugnant to the interest created, are void." California Civil Code, Section 711; see also Section 1441, California Civil Code.

The Government drew the Bill of Sale, executed

and delivered it to us. Concurrently, the Government required the Company to execute and deliver to it a Chattel Mortgage, drawn by the Government, on all of the machinery, tools and equipment, as security for the Note. Paragraph 9 of the Chattel Mortgage provides:

“9. Said Mortgagor does hereby state, declare and warrant that it is the sole and separate owner of all the within mentioned chattels and that there are no liens or encumbrances or adverse claims of any kind whatever on the same or any part thereof.”

What is your construction of that Paragraph?

By acceptance of delivery of the Chattel Mortgage, the Government stated and declared that it had no interest or claim of any kind whatsoever on the machinery, tools and equipment, except the payment of the release price provided in Paragraph 3 of the Chattel Mortgage.

We are at a loss to know what the Navy Department means by the statement in its telegram that the “Government will hold you strictly accountable for any violations of this agreement,” because no violation of the agreement has been or can be shown. We are interested in knowing how the Government would go about holding the Company accountable. The Government cannot bring suit to quiet its title to the chattels; it has no title. The Government cannot foreclose the Chattel Mortgage because of the sale of some of the equipment, because the release price agreed upon has been paid and

releases have been given by the Government for all of the chattels so sold. The Government cannot bring suit for breach of covenant, because the covenant against resale is void under Section 711 of the California Civil Code. There is no reverter in the Bill of Sale; if a condition is broken, nothing happens. These propositions are all firmly established by the numerous decisions we have cited in our briefs filed with the Departments September 7 and 9, 1949. The property is in California; therefore it is regulated by California law.

Columbia Railway, Gas. & Electric Co. v.
South Carolina,

261 U. S. 238, 43 Sp. Ct. Rept. 306;

Fitzgerald v. County of Modoc,

164 Cal., 494, 129 Pac. 794, 44 LRA (N.S.)
1229;

Thompson v. Magnolia Pipe Line Co.,

309 U. S. 476, 60 Sp. Ct. Rep. 628;

Los Angeles and Salt Lake Ry. Co. v. U. S.,
(CCA 9th Cir.) 140 Fed. 2d 43, 438.

Until these well established points of law applicable to the Bill of Sale and Chattel Mortgage have been answered satisfactorily to us, we shall proceed with the sale of such machinery, tools and equipment as we desire to sell.

Finally, we again mention the 7 releases of machinery, tools and equipment which have been given to us by the GSA, copies of all of which you now have. If the condition in Paragraph 3 of the Bill of Sale, or any other condition, had been valid, these

releases would be a waiver of them on the part of the Government.

California Civil Code, Sections 3515 and 3516. The releases are conclusive evidence of this waiver.

Section 203(d), Public Law 152, 81st Congress. Our attorney, Mr. Neblett, will be at the Washington Hotel in Washington next week. He will be glad to discuss this subject with you, if you will inform him of your convenience.

Respectfully yours,

WM. H. NEBLETT,

Attorney for Oakland Dock &
Warehouse Co.

Enclosures:

Release dated May 8, 1950.

cc: Twelfth Naval District,
San Francisco, California.

Affiant denies that the machine tools or items of industrial equipment already sold and disposed of by the Corporation, or those which will be sold and disposed of by it, has or will materially reduce the capacity of the plant to produce items for which it was designed and further denies that these items, or any of them, are subject to the restrictions of Paragraph 3 of the Bill of Sale, or any restriction whatsoever. No reply has been received from the Government to letter of Wm. H. Neblett of May 26, 1950, addressed to the Assistant Secretary of the Navy.

Affiant is informed that Mr. Neblett arrived in

Washington from California on June 1, 1950. In the afternoon of that day Mr. Stein, Counsel for the Bureau of Ships, Navy Department, telephoned and asked that he come to his office in the Navy Building the next day for an interview. Mr. Neblett went to Mr. Stein's office on the morning of June 2, and there saw and talked with Mr. Stein and Mr. Paisley, Assistant Counsel for the Navy. The conversation turned upon the proposal of Messrs. Paisley and Stein that the Company make an application to the Munitions Board to reform the Bill of Sale. After this discussion had continued for approximately two hours, Mr. Neblett was informed by Mr. Paisley that the Navy Department had referred the matter to the Department of Justice with a request that suit be immediately filed against the Company. Thereupon Mr. Neblett said there was no need for going on with the conference and that he would discuss the matter with the Department of Justice. Subsequently, and on June 7 and 8, 1950, Mr. Neblett interviewed Mr. Donald McGinness and Mr. Graham Morisson, in charge of this matter for the Department of Justice, concerning the request of the Navy made to the Attorney General's Office to file suit against the Company. While these discussions were in progress, the suit was filed June 8. During the discussions with members of the Attorney General's Office, Mr. Neblett delivered to Mr. McGinness and to Mr. Morisson separately certain memoranda of points and authorities of which the following are copies:

(Oakland Dock & Warehouse Co.
Oakland, California.)

Restraints on Alienations are Invalid

Covenants, conditions and restrictions against the resale of property when title has been conveyed are universally held to be invalid. The rule is statutory in California.

California Civil Code, Section 711.

The Navy has objected to the sale of the chattels because of the restraint on alienation contained in Paragraph 3 of the Bill of Sale.

The restraint on alienation in Paragraph 3 is that none of the chattels may be sold or disposed of without the written consent of the Secretary. The restraint is not valid. It has been expressly so held by the Supreme Court in California on the ground that the restraint violates both the Civil Code Section 711 and the general common law principles. Such a restraint is invalid whether or not it is partial or general.

Murray vs. Green,

64 Cal. 363, 28 Pac. 118;

Barnell vs. McLaughlin,

173, Cal., 213, 159 Pac. 590;

Los Angeles Investment Company v. Gary,

181 Cal., 680, 186 Pac. 596;

Title Guaranty & Trust Co. v. Garrott,

42 Cal. App. 152, 183 Pac. 470.

The property being in California is governed by the laws of that state.

Columbia Railway, Gas & Electric Co. v.
South Carolina, 261 U. S. 238, 43 Sp. Ct.
Rept. 306;

Fitzgerald v. County of Modoc,
164 Cal., 494, 129 Pac. 794, 44 LRA (N.S.)
1229;

Thompson v. Magnolia Pipe Line Co.,
309 U. S. 476, 60 Sp. Ct. Rept. 628.

The intention of the parties to the Bill of Sale must be ascertained from the Bill of Sale alone. Oral evidence is not admissible to show what that intention was. These principles are true although the United States is a party.

Los Angeles and Salt Lake Ry. Co. v. U. S.
(CCA 9th Cir.) 140 Fed. 2d 438.

(Oakland Dock & Warehouse Co.
Oakland, California.)

Waiver

~~Either party may waive the provision of Section 711 of the Civil Code.~~ If the conditions of the Bill of Sale had been valid, they would have been waived by the Government when it released from the chattel mortgage the numerous items of machinery, tools and equipment which had been sold. The Government at all times has had knowledge that the property which it so released had been sold prior to the time the releases were given.

“Any one may waive the provisions of a law or a contract for his benefit.”

California Civil Code,
Sections 3268, 3513, 3515, 3516.

Patton v. Patton,

32 Cal. (2d) 520, 196 Pac. (2d) 909.

At the time the foregoing memoranda was handed to Messrs. McGinness and Morisson, Mr. Neblett also called their attention to Section 3423 (Fifth) of the California Civil Code, and each of them took down a reference to that section.

II.

The Company purchased from the Government on June 1, 1949, the machinery, tools and equipment described in the Bill of Sale which is attached to the complaint as Exhibit 1. On the same date the Government conveyed to the Company by quitclaim deed, 52.9 acres of land upon which the machinery, tools and equipment were located. Attached hereto as Exhibit 1 and made a part of this affidavit is a copy of the quitclaim deed. The Company paid \$1,201,500 for the property; \$240,300.00 was paid in cash and the balance, \$961,200.00, was represented by a note payable in twenty (20) equal annual installments at 4% interest. This note is secured by a trust deed on the real property and a chattel mortgage on the machinery, tools and equipment. Attached to this affidavit as Exhibit 2 and made a part of it is a copy of the Chattel Mortgage. The 52.9 acres conveyed by the Government to the Company is only half of the shipyard known as the Moore Drydock, West Yard. The other half, lying to the east of the property of the Corporation, is on land belonging to Western Pacific Railroad

Company. On February 28, 1950, the Government modified the quitclaim deed as shown by a copy of it attached as Exhibit 3 and made a part of this affidavit.

/s/ JULES J. AGOSTINI, JR.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 13th day of June, 1950.

[Seal] /s/ LILLIAN C. HANABLE,
Notary Public.

My commission expires February 14, 1952.

/s/ WILLIAM H. NEBLETT,
Attorney for Defendant, Oakland Dock & Warehouse Co.

EXHIBIT No. I

Copy

Quitclaim Deed

This indenture, made this first day of June, 1949, between the United States of America, acting by and through War Assets Administration under and pursuant to Reorganization Plan One of 1947 (12 F. R. 4534) and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765) as amended, hereinafter referred to as Grantor, and the Oakland Dock and Warehouse Company, a corporation duly organized and existing under and by virtue of the laws of

the State of California and having its principal office and place of business at Oakland, California, hereinafter referred to as Grantee,

Witnesseth:

That the said Grantor, for and in consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, and other good and valuable considerations, the receipt of which are hereby acknowledged, has remised, released and forever quitclaimed, and by these presents does hereby remise, release and forever quitclaim unto the said Grantee, its successors and assigns, subject to the reservations and conditions hereinafter set forth, all that certain piece or parcel of land situate, lying and being in the City of Oakland, County of Alameda, State of California, and more particularly described as follows:

Parcel 1: Beginning at a point in the dividing line between the tracts of land designated as "B" and "C" in the partition deed between John C. Hays, John Caperton and others, recorded in Book "A" of Deeds, page 275, et seq., in the office of the County Recorder of said County of Alameda, distant thereon 51.567 feet south $32^{\circ} 17'$ west from a concrete monument in the center line of the present track of Western Pacific Railway Company; thence south $78^{\circ} 08'$ west, parallel with said center line, a distance of 965.663 feet to a point; thence north $11^{\circ} 52'$ west a distance of 22.00 feet to a point; thence south $78^{\circ} 08'$ west a distance of 212.134 feet to a point; thence south $7^{\circ} 10'$ west a distance of

63.470 feet to a point; thence south $78^{\circ} 08'$ west, a distance of 60.00 feet to a point; thence south $7^{\circ} 10'$ west a distance of 120.00 feet to a point; thence north $82^{\circ} 50'$ west a distance of 60.00 feet to a point; thence north $7^{\circ} 10'$ east a distance of 99.301 feet to a point; thence south $78^{\circ} 08'$ west a distance of 707.903 feet to a point distant 181.396 feet south $32^{\circ} 17'$ west (measured along the western line of the parcel conveyed to Central Pacific Railroad Company by The Oakland Water Front Company by deed dated May 3, 1878, and recorded February 3, 1879, in Deed Book 175, page 223, Alameda County Records) from a concrete monument set in said western line and distant thereon north $32^{\circ} 17'$ east 76.870 feet from the center line of the main track of Western Pacific Railroad Company; thence south $32^{\circ} 17'$ west a distance of 518.801 feet to a point in the eastern production of the agreed low tide line of May 4, 1852, as described in Ordinance 709 N.S. of the City of Oakland; thence south $57^{\circ} 43'$ east a distance of 150.00 feet to a point; thence south $22^{\circ} 44' 22''$ west a distance of 550 feet, more or less, to the United States Pierhead line; thence easterly along said Pierhead line 1290 feet, more or less, to a point in the line dividing said tracts "B" and "C"; thence along said dividing line north $32^{\circ} 17'$ east a distance of 1950 feet, more or less, to the point of beginning.

Parcel 2: Commencing at a concrete monument set on the western boundary line of the parcel of land heretofore conveyed to Central Pacific Rail-

road Company by The Oakland Water Front Company by deed dated May 3, 1878, and recorded February 3, 1879, in Deed Book 175, page 223, Alameda County Records and distant thereon north $32^{\circ} 17'$ east 76.870 feet from the center line of the main track of Western Pacific Railroad Company; thence south $32^{\circ} 17'$ west along the said western boundary line a distance of 700.197 feet to a point on the eastern production of the agreed low tide line of May 4th, 1852, as said low tide line is described in Ordinance 709 N.S. of the City of Oakland; thence south $57^{\circ} 43'$ east a distance of 50.00 feet to the true point of beginning of the area to be described; and running thence south $57^{\circ} 43'$ east a distance of 100.00 feet to a point; thence south $22^{\circ} 44' 22''$ west a distance of 635.677 feet to a point on the low tide line as described in the agreement between City of Oakland, Southern Pacific Company and Central Pacific Railroad Company, recorded in Book 2852 of Official Records, page 362, Alameda County Records; thence north $10^{\circ} 07'$ east along said low tide line a distance of 544.387 feet to a point; thence north $32^{\circ} 17'$ east a distance of 122.725 feet to the true point of beginning.

Parcel 3: Beginning at the intersection of the dividing line between the tracts of land designated "B" and "C" in the partition deed between John C. Hays, John Caperton and others, recorded in Book "A" of Deeds, page 275, et seq., in the office of the County Recorder of said County of Alameda, with the agreed low tide line of 1852 as described in the agreement between City of Oakland, Southern

Pacific Company and Central Pacific Railroad Company, recorded in Book 2852 of Official Records, page 362, Alameda County Records; thence north $85^{\circ} 01' 07''$ west along said agreed low tide line 743.489 feet; thence north $78^{\circ} 48' 15''$ west along said agreed low tide line, 550.824 feet; thence north $22^{\circ} 44' 22''$ east 83 feet, more or less, to the United States Pierhead Line; thence easterly along said Pierhead Line 1290 feet, more or less, to said dividing line between said tracts of land designated "B" and "C"; and thence along the last named line south $32^{\circ} 17'$ west 83 feet, more or less, to the point of beginning.

Together with the right and use in common with others of C. & O. Track No. 40 as said right and use is specified in that certain lease agreement by and between the Moore Drydock Company and the Western Pacific Railroad Company identified as Moore Drydock Company Lease No. 26, dated January 1, 1944; and

Together with the following licenses:

License "Q" as executed August 10, 1942, by and between the Western Pacific Railroad Company as Licensor and Moore Drydock Company as Licensee.

License "R," as executed Aug. 1, 1942, by and between the Central Pacific Railroad Company as Licensor and the Moore Drydock Company as Licensee.

License "Z," as executed May 1, 1944, by and between the Western Pacific Railroad Company as Licensor and the Moore Drydock Company as Licensee.

Subject to prior authorization for the use of certain drainage and sewerage structures connecting to drainage and sewerage lines on the heretofore described realty, which drain age and sewerage structures are operated and maintained by the Navy Dapartment, the City of Oakland, the Central Pacific Railroad Company and the Western Pacific Railroad Company.

And further subject to any and all easements, rights-of-way or other encumbrances of record affecting the heretofore described realty.

Excepting, however, from the conveyance and reserving to the United States of America, in accordance with Executive Order 9908, approved on December 5, 1947 (12 F. R. 8223), all uranium, thorium and all other materials determined pursuant to section 5(b)(1) of the Atomic Energy Act of 1946 (60 Stat. 761), to be peculiarly essential to the production of fissionable material contained, in whatever concentration, in deposits in the lands covered by this instrument, are hereby reserved for the use of the United States, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same, making just compensation for any damage or injury occasioned thereby. However, such land may be used, and any rights otherwise acquired by this disposition may be exercised, as if no reservation of such materials had been made; except that, when such use results in the extraction of any such material from the land in quantities which may not be trans-

ferred or delivered without a license under the Atomic Energy Act of 1946, as it now exists or may hereafter be amended, such material shall be the property of the United States Atomic Energy Commission, and the Commission may require delivery of such material to it by any possessor thereof after such material has been separated as such from the ores in which it was contained. If the Commission requires the delivery of such material to it, it shall pay to the person mining or extracting the same, or to such other person as the Commission determines to be entitled thereto, such sums, including profits, as the Commission deems fair and reasonable for the discovery, mining, development, production, extraction, and other services performed with respect to such material prior to such delivery, but such payment shall not include any amount on account of the value of such material before removal from its place of deposit in nature. If the Commission does not require delivery of such material to it, the reservation hereby made shall be of no further force or effect.

Together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, in law as well as in equity, of the said Grantor, of, in or to the foregoing described premises, and every part and parcel thereof, with the appurtenances.

And subject to the following covenants and conditions by the grantee herein to be performed:

1. The above-described realty hereinafter referred to as the "plant" is considered a war reserve plant and, as such, will be of vital interest to the United States of America in time of emergency.

2. A dormant estate for a period of twenty (20) years is reserved by the United States of America, which dormant estate may be activated for one or more periods not exceeding five (5) years' duration each. At the completion of the twentieth year, the grantee will have clear and complete title.

3. The grantee, or the Secretary (as hereinafter defined), may at any time cause a re-examination of the necessity for continuing the dormant estate upon the plant or any portion thereof. Such estate may be discontinued at any time during the twenty-year period when the Secretary determines such action consistent with the national defense interests of the United States.

4. The dormant estate may be activated by the Secretary at any time prior to the expiration of the twenty-year period, by written instructions to the grantee, whenever in the opinion of the Secretary, considerations of national defense so required. In the event the dormant estate is so activated, the United States of America shall have the right to full possession and use of the plant.

5. When, in the opinion of the Secretary, it becomes necessary for the United States of America

to utilize the productive capacity of the plant for purposes of national defense, the United States of America will undertake to negotiate a satisfactory contract with the grantee provided such grantee is, in the opinion of the Secretary, qualified to perform the work designed. In the event a mutually satisfactory contract cannot be negotiated with the grantee within a period of fifteen days, the United States of America may proceed to activate the dormant estate.

6. The Grantee, upon receipt of written notice that the dormant estate has been activated, will immediately proceed to remove improvements, fixtures, alterations, machinery and other equipment, in accordance with the directions and instructions in such notice. Such action will be completed in the shortest possible time but in no case in excess of 120 days from the date written notice is received. Thereafter, the Grantee will immediately vacate and peaceably surrender possession of the plant to the United States of America and will permit the United States of America to have the use of such easements and rights-of-way over and upon the property of the Grantee as may be necessary or convenient for the operation of the plant.

7. In the event the dormant estate is activated, the United States of America will pay to the Grantee:

(a) Reasonable costs and expenses in connection with restoring the plant to its condition at the time of sale or in performing other work,

to the extent required by directions and instructions received from the appropriate Secretary.

(b) Reasonable costs of reinstalling the Grantee's machinery, equipment and improvements when possession of the plant by the United States of America is relinquished to the Grantee.

(c) Fair compensation for loss incurred on work in process in the plant which cannot be completed due to the activation of the dormant estate.

The United States of America will not compensate the Grantee for losses and damages other than herein provided.

8. During the period or periods that the dormant estate is activated, the United States of America will pay the Grantee compensation at a rate to be fixed by the Secretary, which rate shall not be in excess of the prevailing normal rental for similar industrial properties.

9. During the twenty-year period, the Grantee will not, without the written consent of the Secretary, make alterations of the structure of the buildings and will not move or alter any non-severable building, installation or land improvements, which alterations will impair or diminish the capacity, existing at the time of sale, of the facility to produce the items for which it was designed unless restoration can be made within a period of 120 days or less, or unless other facilities determined by the Sec-

retary to have equivalent productive capacity are made available and are made subject to all provisions of this National Security Clause, including the extension thereto of a dormant estate in the United States of America therein, by modification of this contract in writing.

10. The Grantee will maintain all lands, structures and appurtenances now in or appurtenant to the plant and belonging to the United States of America at the time of sale through the period specified below in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time, but in no case in excess of 120 days; provided, however, that Grantee shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified; and provided further that nothing contained in this agreement shall be construed to prevent the Grantee, for improving operating efficiency or increasing productive capacity, from moving any of the machine tools or readily severable facilities conveyed hereunder from place to place within the plant.

| Facility | Period Maintenance |
|--------------------------------------------------------------------------------------------------------------|-----------------------|
| (a) Lands, permanent structures and appurtenances (main structural frame of metal, concrete or masonry | 20 years |
| (b) Timber structures and their appurtenances | 15 years |
| (c) Machinery, machine tools and equipment | 10 years |

11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

12. When, in the opinion of the Secretary, the Grantee fails to comply with the obligations imposed upon it hereunder, the United States of America shall have the right to take full possession of the plant and to take such action as may be necessary to remedy the Grantee's default. All costs incidental to taking possession of the plant under these circumstances and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee. Upon completion of such work, possession of the plant will be returned to the Grantee unless the dormant estate is activated in the interim.

13. In the event the plant is destroyed or otherwise substantially damaged prior to the expiration of the twenty year period, the Secretary will review the necessity for retaining the dormant estate. In the event it is determined by the Secretary that the dormant estate no longer need be retained in the interest of national defense, a quitclaim deed will be given to the Grantee.

14. As used in this agreement the term "Secretary" shall be deemed to refer either to the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, and to their respective duly appointed representatives, depending upon which of said Departments had jurisdiction and

control over the plant prior to its declaration as surplus, or to such of said three Secretaries as may have been designated by the Munitions Board. The term "Grantee" shall be deemed to refer to the Grantee hereunder, its successors, assigns and any subsequent transferee or transferees of the plant. The term "plant" refers to the property sold, conveyed and transferred hereunder and to any part or portion thereof.

15. The Grantee shall cause this agreement to be duly and properly recorded so as to put third persons upon notice of the United States of America's interest in the plant hereunder and shall furnish evidence of such recordation to War Assets Administration.

Said land was duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and WAA Regulation No. 1 as amended.

To have and to hold, all and singular, the said premises with the improvements thereon, unto the said Grantee, and its successors and assigns forever.

And the said Grantee has certified, and by acceptance of this quitclaim deed, agrees for itself, its successors and assigns, as follows:

1. That the said Grantee is acquiring the above-described property for its own use and not for the purpose of reselling the same.

2. That in no way will the Grantee resell the above property within two (2) years from the date

of this instrument without first obtaining the written authorization of the War Assets Administration, or its successor in function.

In witness whereof, Grantor has caused these presents to be executed the day and year first hereinabove written.

UNITED STATES OF
AMERICA,

Acting by and Through War
Assets Administration.

By /s/ ROBERT B. BRADFORD,
Regional Director, Region 10,
San Francisco, California.

State of California,
City and County of San Francisco—ss.

On this 21st day of June, 1949, before me, Maude C. Phelps, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Robert B. Bradford, known to me to be the Regional Director, War Assets Administration, Region 10, San Francisco, California, and known to me to be the person who executed the within instrument on behalf of said War Assets Administration, which executed said instrument on behalf of the United States of America, and acknowledged to me that he subscribed to the said instrument the name of the United States of America and the name of the War Assets Administration on behalf of the United States of America, and further

that the United States of America executed said instrument.

Witness my hand and Official Seal.

[Seal] /s/ MAUDE C. PHELPS,
Notary Public in and for the City and County of
San Francisco, State of California.

Exhibit No. 2

Moore Drydock
Oakland, Calif.
M-Calif-174

Chattel Mortgage

This Mortgage, made and entered into this first day of June, 1949, by Oakland Dock and Warehouse Company, a corporation organized and existing under the laws of the State of California, and having its principal place of business in the Financial Center Building, Oakland, California, Mortgagor, to War Assets Administration, acting for and on behalf of the United States of America, having its office at 1000 Geary Street, San Francisco, California, Mortgagee;

Witnesseth:

The said Mortgagor does hereby mortgage to said Mortgagee all of the Mortgagor's chattels which are more particularly described as:

All that certain personal property located on that portion of the Moore Drydock Company West Yard, Oakland, California, comprising 52.69 acres, more or less, as owned by the United States of America and conveyed to

Mortgagor by quitclaim deed of even date, the same being more specifically described in WAA-4 Folders Numbered 1, 2, 2a, 3, 3a, 4, 5, 6, 7, 8, 9, 10, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 12, 13, 14, 15, 16, 17, 18, 19, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, 20-9, 21, 22-1, 22-2, 22-3, 22-4, 22-5, 22-6, 22-7, 22-8, 22-9, 23, 24, 25, 26, 27 and 28;

Together With any and all replacements of the above-described chattels or any part thereof, which said replacements shall forthwith and without further act be and become subject to the lien of this Mortgage.

All as Security for the payment to and full compliance with the terms and provisions of that certain Promissory Note dated June 1, 1949, executed by the undersigned, Oakland Dock and Warehouse Company, payable to the order of Mortgagee at the office of the War Assets Administration, or its successor in function, in the City of San Francisco, State of California, in lawful money of the United States of America in the principal sum of Nine Hundred Sixty-One Thousand Two Hundred Dollars (\$961,200) with interest on the unpaid balance thereof at the rate of four per cent (4%) per annum from June 1, 1949, payable as to interest and principal as follows: Interest computed from June 1, 1949, payable June 1, 1950, and on each due date of principal thereafter; principal payable in annual installments of Forty-Eight Thousand Sixty Dollars (\$48,060) commencing June 1, 1950, and on June 1

of each and every year thereafter until said balance of Nine Hundred Sixty-One Thousand Two Hundred Dollars (\$961,200), together with accrued interest thereon, shall have been paid in full.

1. Mortgagor Agrees to notify Mortgagee of the acquisition of and/or replacements to the above-described chattels promptly after each acquisition or replacement thereof, stating the nature, quantity or amount of such chattels so acquired, the interest of the Mortgagor therein and the cost thereof to the Mortgagor, and Mortgagor agrees to execute and deliver on demand any and all other instruments which Mortgagee may require to protect its interests or secure said Note, and failure, neglect or refusal to do so may be treated by Mortgagee as a default herein and in said Promissory Note.

2. Mortgagor shall not have the right, power or authority to, and will not, without the written consent of Mortgagee, remove from its present location as herein above set forth, or sell or encumber any of the mortgaged chattels, or substitute or replace any of the mortgaged chattels.

3. The Mortgagee Agrees to release all the chattels from the lien of this chattel mortgage upon the payment by Mortgagor to Mortgagee the sum of Three Hundred Sixty-Six Thousand Six Hundred Sixty Dollars (\$366,660), which sum has been established as the fair value of said chattels. The Mortgagee will also release a part or any portion of said chattels upon the payment by the Mortgagor to

Mortgagee of the fair value (fair value to be established by Mortgagee) of the property to be released. All payments so made shall be applied against the unpaid balance of the total indebtedness of Nine Hundred Sixty-One Thousand Two Hundred Dollars (\$961,200) in the inverse order of maturity, as specified in the terms of the promissory note of even date.

4. Mortgagor Agrees not to create or permit to accrue, upon or in respect to Mortgagor's chattels, or any part thereof, any lien, encumbrance, tax, assessment or charge which, if unpaid, would be or become prior or equal to the lien of this mortgage, or would have priority or equality in distribution on any sale of the mortgaged chattel. Mortgagor agrees to carry and pay for adequate insurance against fire and such other risks as Mortgagee may require and in such companies, forms and amounts as may be approved by Mortgagee, with loss payable to the parties concerned, including Mortgagee, as their interests may appear. Mortgagee may at any time, and from time to time, pay or cause to be paid any such lien, encumbrance or other charge or expense, and may take all action necessary or proper to effect a discharge, satisfaction or subordination thereof. All sums and any and all incidental costs and expenses paid or incurred by Mortgagee in connection therewith, or for the preservation or maintenance of the chattels covered by this mortgage, with interest thereon, shall be added to the principal amount then due on the note and shall be secured by this mortgage.

5. Mortgagor will, while any of the indebtedness secured hereby remains unpaid, pay, at least ten (10) days before delinquency, all taxes (both general and special), assessments and governmental charges lawfully levied or assessed against the said chattels or any part thereof; promptly will furnish the Mortgagee or holder of the indebtedness secured hereby the official receipts showing such payments except when payments are made by Mortgagee as herein before provided; and will allow no payment of any taxes, assessments or governmental charges by a third party with subrogation attaching, nor permit the said chattels, or any part thereof, to be sold or forfeited for any tax, assessment or governmental charge whatsoever. Any irregularities or defects in the levy or assessments of taxes, assessments and governmental charges paid by the Mortgagee are hereby expressly waived and a receipt by the proper officer shall be conclusive evidence both as to the amount and validity of such payments.

6. Mortgagor Agrees to maintain the said chattels as herein above described and every part thereof in thorough repair, working order and condition, and free from waste or nuisance of any kind; will make from time to time all repairs, renewals, replacements, improvements, betterments and additions which may be needful or proper to preserve and maintain the said chattels; will operate the said chattels in an efficient and first-class manner; will use diligence to keep the said chattels in state of good order and repair; will comply with and abide by all laws, ordinances and regulations affecting the

said chattels or the maintenance, repair, alteration, improvement or use thereof; will not alter, destroy or remove any of the chattels or permit the same to be altered, destroyed or removed, without first obtaining the permission, in writing, of the Mortgagee; and will permit the Mortgagee, its agents or representatives to inspect the said chattels at any reasonable time or times; and will do any other act or acts, all in a timely and proper manner, which from the character or use of the said chattels may be reasonably necessary to preserve the same.

7. It Is Also Agreed that if the Mortgagor shall fail to make any payments or default in any of the terms, conditions, covenants or agreements in said Promissory Note or this Chattel Mortgage provided or referred to, or made incidental to or in connection with the loan secured hereby, or if there be a breach or failure in any of the covenants or warrants herein contained, then the Mortgagee may take possession of said chattels, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, it being hereby understood that the Mortgagee or the holder of the aforesaid Note may purchase at such sale, and from the proceeds pay the whole amount payable hereunder and under said Note and all costs of sale, including costs of title search, and reasonable counsel fees in connection therewith, paying the overplus to the said Mortgagor, all of said costs, including said counsel fees, being hereby secured, and in the event of any foreclosure or other action in Court,

the appointment of a Receiver, without notice, is hereby consented to.

8. It Is Further Agreed that said Promissory Note is also secured by a certain Deed of Trust to the United States of America, acting by and through War Assets Administration, of even date herewith and it is hereby agreed that in case of default under said Note, the holder thereof may, at its sole option, and without limiting or affecting any rights or remedies conferred upon it by this Mortgage or said Deed of Trust, foreclose this Mortgage and/or exercise any of the rights and remedies conferred upon it under said Deed of Trust, either concurrently, or in such order as it may determine, and may sell, or cause to be sold, in such order as it may determine, as a whole, or in such parcels as it may determine, the chattels described in this Mortgage and/or in said Deed of Trust.

9. Said Mortgagor does hereby state, declare and warrant that it is the sole and separate owner of all the within mentioned chattels and that there are no liens or encumbrances or adverse claims of any kind whatever on the same or any part thereof.

In Witness Whereof, the said Mortgagor has duly [illegible] these presents the day and year first above written.

OAKLAND DOCK AND
WAREHOUSE COMPANY,

By JULES J. AGOSTINI, JR.,
President.

Attest.

[Seal]

A. HANFORD MORGAN,
Secretary.

State of California,
County of Alameda—ss.

On this 29th day of June, 1949, before me, Elizabeth M. Lifschiz, a Notary Public in and for the County of Alameda, State of California, duly commissioned and sworn, personally appeared Jules J. Agostini, Jr., known to me to be the President, and A. Hanford Morgan, known to me to be the Secretary, of Oakland Dock and Warehouse Company, the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and Official Seal.

[Seal]

ELIZABETH M. LIFSCHIZ,
Notary Public in and for the County of Alameda,
State of California.

My commission expires June 17, 1950.

Exhibit No. 3

Moore Dry Dock Co.
(M-Cal-174)

Modification of Covenants and Conditions of
Quitclaim Deed

This Indenture, Made this 28th day of February, 1950, by and between the United States of America,

acting by and through the General Services Administrator, under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress, approved June 30, 1949, and the Surplus Property Act of 1944 (58 Stat. 765) as amended thereby, and regulations and orders promulgated thereunder, hereinafter referred to as Grantor, and Oakland Dock and Warehouse Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, hereinafter referred to as Grantee;

Witnesseth: That the said Grantor does hereby consent to the striking from the Quitclaim Deed heretofore made by Grantor to Grantee, dated the 1st day of June, 1949, and recorded in Book 5831 at page 575, in the County Recorder's Office of the County of Alameda, State of California, on the 29th day of June, 1949, all that part of said Quitclaim Deed beginning with the words,

“And Subject to the following covenants and conditions by the Grantee herein to be performed:”

including paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, which last named paragraph ends with the phrase,

“and shall furnish evidence of such recordation to War Assets Administration.”

and the insertion in lieu thereof, of the following:

And Subject to the following conditions and covenants by the Grantor and the Grantee herein to be performed:

1. The granted premises hereinafter referred to as "plant" constitute a part of the National Industrial Reserve under Public Law 883, 80th Congress, approved July 2, 1948, and have been designated for disposal subject to the provisions of the National Security Clause. This, and the following provisions constitute the National Security Clause of this quit-claim deed.

2. A dormant state for a period of twenty (20) years is reserved by the United States of America, which dormant estate may be activated for one or more periods not exceeding five (5) years' duration each. At the completion of the twentieth year, the Grantee will have clear and complete title.

3. The Grantee, or the Secretary (as hereinafter defined) may at any time cause a re-examination of the necessity for continuing the dormant estate upon the plant or any portion thereof. Such estate may be discontinued at any time during the twenty-year period when the Secretary determines such action consistent with the national defense interests of the United States.

4. The dormant estate may be activated by the Secretary at any time prior to the expiration of the twenty-year period by written instructions to the Grantee whenever, in the opinion of the Secretary, considerations of national defense so require. In the event the dormant estate is so activated, the United States shall have the right to full possession and use of the plant.

5. When, in the opinion of the Secretary, it be-

comes necessary for the United States of America to utilize, in accord with the provisions of Public Law 883, 80th Congress, the productive capacity of the plant for the purpose of national defense, the United States of America will undertake to negotiate a satisfactory contract with the Grantee, provided such Grantee is, in the opinion of the Secretary, qualified to perform the work desired. In the event a mutually satisfactory contract cannot be negotiated with the Grantee within a period of fifteen days, the United States of America may proceed to activate the dormant estate.

6. The Grantee, upon receipt of written notice that the dormant estate has been activated, will immediately proceed, subject to the availability of labor and material, to remove improvements, fixtures, alterations, machinery and other equipment, in accordance with the directions and instructions in such notice. Such action will be completed in the shortest possible time but in no case in excess of 120 days from the date written notice is received. Thereafter, the Grantee will immediately vacate and peaceably surrender possession of the plant to the United States of America and will permit the United States of America to have the use of such easements and rights-of-way over and upon the property of the Grantee as may be necessary or convenient for the operation of the plant.

7. In the event the dormant estate is activated, the United States of America will pay to the Grantee:

(a) Upon completion of the work involved,

fair and reasonable costs incurred by Grantee in complying with paragraph 6 hereof.

(b) When possession of the plant is relinquished to Grantee by the United States of America, reasonable costs of reinstalling Grantee's machinery and equipment and reasonable costs of restoring the plant and all structures and buildings on the plant to the condition they were in at the time the United States went into possession, reasonable depreciation excepted.

(c) Fair compensation for loss incurred on work in process in the plant which cannot be completed due to the activation of the dormant estate.

The United States of America will not compensate the Grantee for losses and damages other than herein provided.

8. During any period in which the dormant estate has been activated, the Government will pay Grantee fair and reasonable compensation for the use of the premises and appurtenances, and the machinery and equipment taken over by the Government, at a monthly rate which shall not be in excess of the prevailing normal rental for similar industrial properties in the locality.

9. During the twenty-year period, the Grantee will not make any alterations, improvements, additions or extensions to the buildings and structures or erect any new building or structure on the premises which would diminish the capacity or impair the utility of the plant for the purpose for which it was

designed, unless the plant can be restored to efficient operation for its designed purpose within not to exceed 120 days. Except as otherwise herein provided, the Grantee, during the twenty-year period, may (i) alter, improve, add to or extend any or all of the buildings and structures now on the property, (ii) erect additional buildings and structures on all or any part of the premises not now occupied by the permanent buildings (main structural frame of metal, concrete or masonry) and the piers and (iii) replace any of the piers and nonpermanent buildings and structures with piers and buildings or structures having equivalent capacity. All such work shall be done in compliance with the Building Code and Fire Ordinances of the City of Oakland, California.

10. The Grantee will maintain all lands, structures and appurtenances now on the plant and all buildings and structures placed thereon by Grantee, reasonable wear and tear and aging excepted, through the twenty-year period in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time but in no event, in excess of 120 days.

11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

12. If, as a result of inspection of the plant, the Government adjudges the Grantee in default, it shall furnish to the latter a written statement setting forth in detail the grounds on which the allegations are

based, following which the Grantee shall have thirty days to submit evidence to the contrary. If, in the light of the evidence so presented, the Government still holds that the Grantee is in default, it shall then advise the latter of the specific defaults to be corrected and the periods of time in which each correction must be completed, such periods to be as reasonable as possible. If the Grantee fails to correct its defaults in the times stated, the Government shall then have the right to take possession only of that part of the premises on which the breach has occurred and to remedy the Grantee's default. The Government, or any contractor employed by the Government for the purpose, shall have such right of access over Grantee's premises to that part thereof as may be necessary to permit repairs and replacements to be made to correct the default of Grantee. All costs incidental to taking possession of such part of the plant as may be necessary under these circumstances, and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee. Upon completion of such work, possession of the part, or parts, of the plant taken over by the Government will be returned to the Grantee unless the dormant estate is activated in the interim.

13. In the event the plant is destroyed or otherwise substantially damaged prior to the expiration of the twenty-year period, the Secretary will review the necessity for retaining the dormant estate. In the event it is determined by the Secretary that the dormant estate no longer need be retained in the

interest of national defense, a quitclaim deed will be given to the Grantee.

14. As used in this agreement, the term "Secretary" shall be deemed to refer to the Secretary of Defense, as used in Public Law 883, 80th Congress, and to his duly appointed representatives. The term "Grantee" shall be deemed to refer to the Grantee hereunder, its successors, assigns, and any subsequent transferee or transferees of the plant. The term "plant" refers to the property sold, conveyed and transferred hereunder and to any part or portion thereof.

15. The Grantee shall cause this agreement to be duly and properly recorded so as to put third persons upon notice of the United States of America's interest in the plant hereunder and shall furnish evidence of such recordation to General Services Administration, successor in function to War Assets Administration.

In Witness Whereof, the parties hereto have caused this Modification of Covenants and Conditions of Quitclaim Deed to be executed as of the day and year first hereinabove written.

UNITED STATES OF
AMERICA,

Acting by and Through Gen-
eral Services Administrator.

By /s/ ROBERT B. BRADFORD,
Regional Director Liquidation Service, General
Services Administration, San Francisco, Cali-
fornia.

OAKLAND DOCK AND
WAREHOUSE COMPANY,

By /s/ JULES J. AGOSTINI, JR.,
President.

Attest:

/s/ A. HANFORD MORGAN,
Secretary.

State of California,
City and County of San Francisco—ss.

On this 28th day of February, 19 , before me, Steve G. Chapralis, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Robert B. Bradford, known to me to be the Regional Director, War Assets, General Services Administration, San Francisco, California, and known to me to be the person who executed the within instrument on behalf of the General Services Administrator, who executed the said instrument on behalf of the United States of America, and acknowledged to me that he subscribed to the said instrument the name of the United States of America and the name of the General Services Administrator on behalf of the United States of America, and further, that the United States of America executed said instrument.

Witness my hand and official seal.

[Seal] /s/ STEVE G. CHAPRALIS,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires October 22, 1952.

State of California,
County of Alameda—ss.

On this 28th day of February, 1950, before me, Charlotte S. Nutting, a Notary Public in and for the County of Alameda, State of California, duly commissioned and sworn, personally appeared Jules J. Agostini, Jr., known to me to be the President, and A. Hanford Morgan, known to me to be the Secretary, of the Oakland Dock and Warehouse Company, the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that said corporation executed the same.

Witness my hand and official seal.

[Seal] CHARLOTTE S. NUTTING,
Notary Public in and for the County of Alameda,
State of California.

My commission expires April 8, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 29820

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COMPANY,

Defendant.

ORDER DENYING MOTION TO DISMISS AND
GRANTING MOTION FOR TEMPORARY
INJUNCTION

It is the opinion of this Court that the defendant's motion to dismiss should be denied and that plaintiff's motion for a temporary injunction should be granted for the following reasons:

1. Defendant accepted delivery and acquired title to the personal property in issue in this action, subject to all covenants, conditions, restrictions, and reservations set forth in the bill of sale. These included a covenant against the resale, sale, or disposal of the machine tools or other severable productive equipment, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed.

2. These restrictions and covenants are not void as unlawful restraints on alienation but are authorized by the provisions of the National Industrial

Reserve Act of 1948, 62 Stat. 1225. California law governing restraints on alienation does not control such transfer or accompanying restraints.

3. Notwithstanding the covenants and restrictions set forth in said bill of sale and in violation of the terms thereof, defendant has sold and disposed of certain of said machine tools and items of industrial equipment to third persons; and defendant will, unless restrained by order of this Court, sell and dispose of additional items of said machine tools and industrial equipment.

4. Further sale and disposition of said machine tools and items of industrial equipment will materially reduce the capacity of the plant to produce the items for which it was designed. Such further sale and disposition of said machine tools and items of equipment will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948, and would cause irreparable damage to the plaintiff.

5. Plaintiff is therefore entitled to a preliminary injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale, other than the items of personal property listed in Schedule "A" attached to said bill of sale, without the written consent of the Secretary of the Navy. Such injunction, however, is granted without prejudice to defendant's right to enter into any lease agreement with any third party involving the use of said machine tools or items of industrial equipment or the real property on which

said tools and equipment are located, provided such lease shall not permit the removal of said tools and equipment from said premises.

Dated: July 13th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed July 13, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF
APPEALS UNDER RULE 73 (B)

Notice is hereby given that the Oakland Dock and Warehouse Company, a corporation, the defendant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the above-entitled Court granting the motion of the plaintiff for a temporary injunction, entered in this action on the 13th day of July, 1950.

Dated: July 17, 1950.

/s/ WM. H. NEBLETT,
Attorney for Appellant, Oakland Dock and Warehouse Co.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1950.

[Title of District Court and Cause.]

DESIGNATION OF THE PARTS OF THE
RECORD TO BE PRINTED ON APPEAL

Comes now the Oakland Dock and Warehouse Company, the defendant and appellant in the above-entitled action, and designates the parts of the record it desires to have printed for use on its appeal to the United States Court of Appeals for the Ninth Circuit from the order herein granting a preliminary injunction, which order was entered July 13, 1950.

1. The complaint, with the Exhibits attached, except that it desires to omit from the printed record Schedule "A," which is a part of Exhibit 1 to the complaint. Schedule "A" to Exhibit 1, otherwise described as Exhibit "G" is not involved in this action.

2. The affidavit of John Raully.

3. Points and authorities in support of temporary restraining order and order to show cause.

4. Temporary restraining order.

5. Please insert the date on which each of these pleadings and order were filed.

6. The motion of the defendant to dismiss the complaint, together with the points and authorities attached.

7. The answer of the defendant to the complaint.

8. Counter-affidavit of Jules J. Agostini, Jr., in

reply to affidavit of John Rauly, together with Exhibits 1, 2 and 3 attached thereto (Quitclaim Deed dated June 1, 1949; Chattel Mortgage dated June 1, 1949; and Modifications of Covenants and Conditions of Quitclaim Deed dated February 28, 1950.)

9. Please note filing marks on these pleadings and affidavits filed by the defendant.

10. Order denying motion to dismiss and granting motion for temporary injunction filed July 13, 1950.

11. Notice of appeal filed July 17, 1950.

12. Notation on the record that cost bond for \$250.00 was filed with the notice of appeal.

13. A daily transcript was furnished to the Court and to the defendant at the request of the defendant during the four days of hearing. Defendant desires that the testimony of all witnesses taken at the hearing be printed, together with all documents which were read into evidence. At the direction of the Clerk the defendant will promptly reduce this testimony to narrative form. A certified copy of the daily transcript has been filed with the Clerk.

14. Defendant requests that all Exhibits introduced at the hearing be filed with the higher Court without being printed. They are extremely bulky. The greater part of these Exhibits are not material to the case. However, defendant does request that

all Exhibits which were read into the record be printed.

Dated: July 17, 1950.

/s/ WM. H. NEBLETT,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1950.

[Title of District Court and Cause.]

POINTS APPELLANT WILL MAKE
ON THE APPEAL

The appellant will present as its points on the Appeal herein the following things to show that the Court erred in granting the temporary injunction:

1. The complaint does not state a cause of action for an injunction, and the motion to dismiss should have been granted.

2. The defendant is enjoined from selling and otherwise disposing of any of the personal property involved without the written consent of the Secretary of the Navy. The Secretary of the Navy has no authority whatever under Public Law 883, 80th Congress. All of the authority conferred by that Act of Congress is vested in the Secretary of Defense. The temporary injunction is void on its face.

3. The restrictions or covenants against re-sale

of the personal property contained in the Bill of Sale are void as an unlawful restraint on alienation. The California law applies. There is no federal law regulating the disposal of property. The law of the state where the property is situated is the sole law applicable thereto.

4. The order of the Court of July 13, 1950, is an attempt to prevent an alleged breach of contract by injunction.

5. The defendant will urge all six of the reasons appearing in its motion to dismiss on this appeal.

6. The modified Quitclaim Deed dated February 28, 1950, removes the alleged Security Clause from the personal property and sets up in paragraphs 11 and 12 thereof a complete plan and the only plan open to the Secretary of Defense for meeting an alleged breach on the part of the grantee and vendee, the appellant herein. This modified Quitclaim Deed also provides a complete plan for taking over the property upon the conditions and covenants therein contained in the event of an emergency. The Appellate Court will take judicial notice of the existing emergency and the date when it came into being:*

/s/ WM. H. NEBLETT,

Attorney for Appellant.

*As additional designation of parts of the record to be printed, defendant requests that the Notice of Appeal, the Designation of the parts of the rec-

ord to be printed, and these Points be included in the printed record.

Receipt of copy acknowledged.

[Endorsed]: Filed.

[Title of District Court and Cause:]

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND INTERLOCUTORY DECREE
OF INJUNCTION

Pursuant to an order to show cause heretofore issued on the 8th day of June, 1950, based upon the affidavit of John Rauly, directed to the defendant herein, requiring said defendant to show cause, if any it had, why it should not be enjoined, pending the trial of this matter, from selling, delivering, contracting to sell, offering to sell, or otherwise disposing of any of the personal property acquired by the defendant, under the bill of sale, annexed to the complaint on file herein, without the written consent of the Secretary of Navy; and

Pursuant to a motion to dismiss filed by the defendant herein to said complaint,

Said order to show cause and said motion came on regularly for hearing on the 16th, 20th, 21st and 22nd days of June, 1950, in the above-entitled Court before the Honorable Herbert W. Erskine, United States District Judge, said plaintiff being represented by Frank J. Hennessy, Esquire, United States Attorney, and Robert F. Peckham,

Assistant United States Attorney, and defendant being represented by William H. Neblett, Attorney at Law, and oral and documentary evidence having been introduced, and the matter having been argued and submitted upon said evidence and points and authorities submitted herein, and upon the files and the records herein; and

The Court having considered the same and heard the arguments of counsel, and being fully advised, makes the following:

Findings of Fact

I.

This action arises under and involves the interpretation and effect of the following Acts of Congress of the United States of America:

1. The National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225);

2. National Security Act of 1947 (61 Stat. 495);

3. Surplus Property Act of 1944, as amended, (Act of October 3, 1944, 58 Stat. 765, as amended, 50 App. U.S.C. 611, et seq.).

II.

Defendant Oakland Dock and Warehouse Company is a corporation duly organized and existing under the laws of the State of California, with its principal place of business at 1401 Middle Harbor Road, Oakland, California.

III.

By bill of sale dated June 1, 1949, plaintiff, acting through the War Assets Administration, an agency of the United States, sold, transferred, assigned, and delivered to the defendant certain industrial equipment, machine tools, and tools, more particularly described in said bill of sale as WAA-4 Folders Numbered 1, 2, 2a, 3, 3a, 4, 5, 6, 7, 8, 9, 10, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 12, 13, 14, 15, 16, 17, 18, 19, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, 20-9, 21, 22-1, 22-2, 22-3, 22-4, 22-5, 22-6, 22-7, 22-8, 22-9, 23, 24, 25, 26, 27 and 28, upon the covenants, restrictions, conditions, and reservations set forth in said bill of sale, including, among others, the following:

“1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the ‘plant,’ in which the above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

“2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years’ duration each.

“3. The Vendee for a period of ten (10) years

from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of those machine tools or other severable production equipment as listed in Exhibit 'G' of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule 'A' and made a part hereof."

Said covenants, restrictions, conditions, and reservations comprise the "National Security Clause," as that term is defined in Section 452(c), U.S.C.A. Title 50.

IV.

Prior to the execution of said bill of sale and the delivery of said personal property to the defendant herein, said machine tools and items of equipment had been designated as necessary to the national defense to be disposed of under the National Security Clause within the meaning of the National Security Act of 1947 and of the National Industrial Reserve Act of 1948. Said personal property is a part of the National Industrial Reserve.

V.

Defendant, notwithstanding the covenants, restrictions, conditions, and reservations set forth in said bill of sale, and in violation of the terms thereof, has sold and disposed of certain of said machine tools and items of industrial equipment to third persons without the written consent of the Secretary of the Navy (the Navy Department being the department which has jurisdiction over said personal property). The machine tools and items of industrial equipment already sold and disposed of by defendant and which will be sold and disposed of, unless restrained by order of this Court, did not and will not consist of those machine tools and items of equipment listed in Schedule A attached to said bill of sale.

VI.

Unless restrained by order of this Court, defendant will sell, offer for sale, remove, and dispose of additional machine tools and items of industrial equipment, which were conveyed to defendant subject to said covenants, restrictions, conditions, and reservations, without the written consent of the Secretary of the Navy. Further sale and disposition of said machine tools and items of equipment will materially reduce the capacity of the plant to produce the items for which it was designated. Many essential machine tools and items of equipment described herein, which defendant will sell unless restrained by order of Court, cannot be replaced within 120 days. Such further sale and disposition

of said machine tools and items of equipment will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948, and will cause irreparable damage to the plaintiff.

VII.

Defendant has not made, does not propose to make, will not and cannot make, replacement of equivalent machine tools and items of industrial equipment in lieu of those of which defendant has sold and disposed of and will sell and dispose of unless restrained by order of this Court.

VIII.

The said machine tools and items of equipment are located at the former West Yard of the Moore Drydock Company, Oakland, California, now owned by the defendant subject to the National Security Clause. The said West Yard, together with the said machine tools and items of equipment, was built and operated for the purpose of building and repairing ships required by the United States in time of national emergency. The said machine tools and items of equipment can now be used and can continue to be used for the purpose of shipbuilding and ship repairing, and are essential and necessary if the capacity of the said plant to produce the items for which it was designed is not to be materially reduced.

IX.

The "National Security Clause" has not been removed and the said machine tools and items of

equipment are still in the possession of the defendant subject to all the said covenants, restrictions, conditions, and reservations embodied in the said National Security Clause.

X.

Plaintiff has no plain, speedy, or adequate remedy at law and will suffer great and irreparable injury unless, during the pendency of this action, defendant, its servants, agents, and attorneys are enjoined from selling, removing, delivering or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale other than the items of personal property listed in Schedule A attached to said bill of sale, without the written consent of the Secretary of the Navy.

Conclusions of Law

From the foregoing facts, the Court makes the following conclusions of law:

I.

The said machine tools and items of equipment are part of the "National Industrial Reserve" and are in the possession of the defendant subject to the "National Security Clause" within the meaning of the National Industrial Act of 1948.

II.

Further sale and disposition of said machine tools and items of equipment will frustrate and subvert the public policy of the United States as embodied

in the National Industrial Reserve Act of 1948, and will cause irreparable damage to the plaintiff.

III.

Plaintiff is therefore entitled to a preliminary injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by defendant under said bill of sale, other than the items of personal property listed in Schedule A attached to said bill of sale, without the written consent of the Secretary of the Navy.

Decree

Now, Therefore, It Is Hereby Ordered, that the defendant's motion to dismiss is denied.

It Is Further Ordered that the defendant, its agents, servants, employees and attorneys, collectively and individually, and all persons having knowledge of this order, and each of them, are enjoined, restrained, and ordered, during the pendency of this action, from selling, removing, delivering, offering to sell, or otherwise disposing of any of the said machine tools and items of equipment acquired by the defendant under said bill of sale, other than the items of personal property listed in Exhibit G of Schedule A attached to said bill of sale, without the written consent of the Secretary of the Navy. Such injunction, however, is granted without prejudice to defendant's right to enter into any lease agreement with any third party involving the use of said machine tools or items of industrial equip-

ment or the real property on which said tools and equipment are located, provided such lease shall not permit the removal of said tools and equipment from said premises.

Dated: July 31st, 1950.

/s/ HERBERT W. ERSKINE,
Judge of United States
District Court.

Lodged July 7, 1950.

[Endorsed]: Filed July 31, 1950.

[Title of District Court and Cause.]

COUNTER DESIGNATION OF
THE RECORD ON APPEAL

Comes now the plaintiff and appellee herein and, pursuant to Rule 75 of the Federal Rules of Civil Procedure, designates the record on appeal to the United States Court of Appeals for the Ninth Circuit as follows, to wit:

1. All pleadings, orders, transcripts of testimony, exhibits, and all other designations heretofore made by the appellant herein.
2. In addition thereto, the Findings of Fact, Conclusions of Law, and Interlocutory Decree of Injunction entered on July 31, 1950.
3. It is requested that all exhibits be transmitted

to the said Court of Appeals, together with the Clerk's transcript.

Dated: August 7, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ ROBERT F. PECKHAM,
Assistant United States Attorney, Attorneys for
Plaintiff.

[Endorsed]: Filed August 8, 1950.

In the District Court of the United States, North-
ern District of California, Southern Division

No. 29820

In the Matter of

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COM-
PANY,

Defendant.

ORDER TO SHOW CAUSE

San Francisco, California

Friday, June 16, 1950

Before: Honorable Herbert W. Erskine,
Judge.

Appearances:

FRANK J. HENNESSY,

U. S. Attorney by

ROBERT F. PECKHAM, ESQUIRE,

Assistant U. S. Attorney.

WILLIAM H. NEBLETT, ESQUIRE,

On behalf of the Defendant.

The Clerk: United States versus Oakland Dock
and Warehouse Company, Order to Show Cause.

Mr. Peckham: Ready for the Plaintiff, your
Honor:

Mr. Neblett: Ready for the defendant, your Honor.

Mr. Peckham: Your Honor, in this action, if your Honor will recall, the Temporary Restraining Order was issued on June 6, returnable today. Subsequent to that time, Colonel William Neblett, counsel for the Warehouse Company, has filed a motion to dismiss and an answer, together with a counter-affidavit by the president of the corporation, which is on file in this case.

The statute this action, your Honor, arises out of, the action in which the government contends that the defendant company had violated the restrictions and reservations that have been placed in the deed of trust and the quit claim deed and the bill of sale by which they received certain surplus property, namely, the machinery and equipment at the West Yard of the former Moore Drydock Company, located in Oakland, California.

Now, the basis for the inclusion of the conditions and restrictions, which are called the National Securities Clause, is the National Industrial Reserve Act of 1948. In that Act, which is located——

The Court: What is that Act? [3*]

Mr. Peckham: Title 50, Section 451 through 462. The National Industrial Reserve Act, the Congressional policy is declared to be that where surplus property is being, is designated by the Secretary of Defense as belonging, as being part of the Industrial Reserve that may be sold. However, as in the discretion of the Secretary, there may be placed

* Page numbering appearing at top of page of original Transcript of Record.

certain reservations upon said property and those reservations are termed the National Securities Clause.

In this case the reservations are contained in the quit claim deed, which was signed on June 1, 1949, and that quit claim deed included real property. There was also, as of the same date, a bill of sale given for the machinery and material and equipment, and that also included a National Securities Clause provision.

Now, it is with the latter provisions that we are concerned with here. Those provisions contained in the bill of sale, and I would like to outline them as I go along, your Honor.

The Court: Only one appearing for the United States?

Mr. Peckham: Yes.

The Clerk: Who is appearing for the defendants?

Mr. Peckham: Colonel William Neblett is representing the Oakland Dock and Warehouse Company; there is no other appearance. Counsel just sitting in, interested counsel, but there is no other appearance.

During World War II the United States Maritime Commission [4] acquired and constructed and installed the yards over there, as perhaps your Honor is acquainted, at the head of the San Antonio Estuary. The cost, the acquisition cost of the yard and machinery and equipment was over \$10,000,000.00, \$1,246,396.00 representing the actual cost of the plant. At the end of the war these facilities

were declared surplus by the Maritime Commission and turned over to a Surplus Property Administration, later the War Assets Administration, for disposal.

Now, the Munitions Board of the Department of Defence determined that the facilities were to be part of the Industrial Reserve and notified the War Assets Administration these facilities were not to be disposed of without being subject to the National Securities Clause.

I might say, your Honor, that the Munitions Board was delegated all the authority given by this Act by the Secretary of Defence Forestal on July 3, 1949. Now, the——

The Court: What is that National Securities Clause?

Mr. Peckham: Well, let me illustrate by telling your Honor about the provisions that are found in the bill of sale pertinent to this property. The bill of sale provided in this case that for a period of ten years the defendant Oakland Dock and Warehouse Company would not without the written consent of the Secretary of the Navy, remove, sell or dispose of any of the machines, tools, or other production equipment, the loss of which [5] would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machines, tools or separable production.

The bill of sale provides further that the Oakland Company will for ten years protect and maintain the machinery and machine tools so that same may

be put into operation within 120 days after notification by the Secretary in the event of a national emergency. In other words, the purpose of the clause was to keep the plant in one piece as near as possible and to prevent it being sold off piecemeal, so that in the event of a national emergency the plant would be in such shape it could resume production in a period of approximately 120 days from the date it was determined it was necessary for the dormant estate to be activated by the government.

The bill of sale conveys the rights, title and interest of the government in this surplus property to the vendee, but it contains this reservation of what is called the dormant estate. This dormant can then be activated as it appears in the provisions.

Now, the War Assets Administration, on April 1, 1949, accepted the offer of the defendant Oakland Company to purchase this former West Yard of Moore Dry Dock for \$1,215,000.00, not only for the real property, but also for the machinery and equipment, subject to the provisions of the National Security Clause. There had been prior bids on behalf, made by Oakland [6] Company and considerable negotiations regarding the instructions contained in that clause, the National Securities Clause.

The transfer of those facilities was the subject of these two instruments I have spoken of, namely, the quit claim deed, which I believe is annexed to counsel's affidavit, is that correct? The quit claim deed dated June 1, 1949? The quit claim deed and the amendment and the notification.

The Court: There is also here a bill of sale.

Mr. Peckham: The bill of sale I knew was annexed to our affidavit or complaint, your Honor.

These three documents I am sure they will come into the argument, discussion here. The first quit claim deed of June 1, which related to the real property but also had reference to the machinery and equipment. At the same time there was also executed and delivered a bill of sale with the National Securities provisions. There are certain differences in the number of years between the real property and the machinery, but I don't think it concerns us here.

Subsequently, I believe on February 9 of this year, there was a modification of the provisions in the quit claim deed. The modifications pertain to giving the purchaser, the defendant in this case, more leeway in handling the rearranging of the yard and building to the facilities there, but that modification pertains to the real property and to the structures thereon and not to the machinery and equipment; that the provisions that [7] are in the bill of sale contends to pertain to the machinery and equipment and though there is no mention in this modified quit claim deed of the machinery and equipment, and there is no reference or cancellation or revocation of the reservation contained in the bill of sale provided for in this modified quit claim deed.

So that it is our provision that the reservations, the so-called National Securities Clause provisions found in the bill of sale were not at all affected by the modified quit claim deed.

Now, the Oakland Company has for a period of considerably thirty days prior to the issuance of the temporary restraining order, so that the delivered machine tools, machinery and equipment which were subject to this National Securities Clause, and we were prepared to show your Honor in support of our application for a preliminary injunction that these sales have taken place, there has been widespread advertising in newspapers, and circulation of an attractive brochure offering this machinery and equipment for sale, and such sales and deliveries have taken place and continue to take place until the issuance of the temporary restraining order.

Now, I have been conferring with counsel for the defendant, and while this is very much disputed matter, there is apparent dispute as to the fact that these sales have taken place and that these deliveries have been made, and the sales and [8] deliveries have been made of property covered by the provisions of the—the reservations that are found in the bill of sale.

Going back, your Honor, to the determination of the West Yard Moore Dry Dock Company being designated as part of the Industrial Reserve, such designation is found, was originally found as included, as pointed out in the affidavit, as annexed to the complaint, in the letter from a Major General Timberlake of the Munitions Board to the War Surplus Administration, which states that this yard is one of approximately, I believe, 114 defence plants and similar establishments that could only be dis-

posed of as surplus property if the National Securities Clause was included.

Subsequently, in the reports of the Munitions Board to the Congress on the National Industrial Reserve of April 1, 1949, and the supplemental and second annual report of April 1, 1950, to Congress, the West Yard of the former Moore Dry Dock Company has been included as part of the National Industrial Reserve.

It is the contention of the Government and the reason for its application for a preliminary injunction pending the determination of the matter, that the strength of the National Securities Clause rests, not only in this case, but in other cases, will largely be determined by what action is taken in this case. The Government contends that of course that it is subject to irreparable damage and when the National Securities Clause is violated, that the intent of Congress has been, the [9] integrity of the National Reserve Act of 1948 is violated by the dismantling and selling and disposing and removing of the machinery and equipment that makes up this ship-repairing installation, which was formerly the West Yard over there, and that this is a proper proceeding to ask the Court to issue a preliminary injunction.

At this time, your Honor, I will not go any further in answering, in anticipating counsel's arguments that I am sure that he intends to make on the motion to dismiss. This is by way of a preliminary statement and by way of a statement as

to what we would intend to show on a hearing for a preliminary injunction.

Much of this is covered in our affidavit and exhibits and we have witnesses from the War Assets Administration and from the Bureau of Ships in the Navy that we could call. I believe counsel will stipulate that it will be necessary to call witnesses from Moore Dry Dock or Lyko Company to show machinery and equipment has been sold and delivered within the past sixty days or thirty days, the Government contends violation of the National Securities Clause.

Mr. Neblett: If the Court please, I desire first to pass to the Court our motion to dismiss, which is, of course, based entirely on legal conclusions. On the question of evidence, if the Court should deny the motion to dismiss, we will present our arguments and evidence later, on the [10] evidence if developed, by the affidavits and evidence produced here in the hearing.

At the opening of my argument, and in order that the Court may fully understand the location and the property described, I have asked counsel for the Government to let me present to the Court the photostatic copy showing the relative location of this property which was purchased by Oakland Dock and Warehouse Company from the Government, and also the detailed map of the property, and I will present those with the consent of counsel for the Government, offer them in evidence on behalf of the defendant.

Mr. Peckham: Yes, your Honor, I understand

these are the maps furnished originally by the War Assets Administration. They are copies, photostatic copies, of those, aren't they?

Mr. Neblett: That is right.

Mr. Peckham: Yes. There is no objection, your Honor.

The Court: That may go in evidence and be marked Defendant's Exhibit A.

(Whereupon the map above-referred to and marked Defendant's Exhibit A was received in evidence.)

Mr. Neblett: This is a map, a photostat, your Honor, which I think is probably A, and the other one would be B.

The Court: All right, the photostat will be marked.

(Whereupon the map above-referred to and marked Defendant's Exhibit B was received in evidence.) [11]

Mr. Neblett: I believe in my opening remarks that I should say something to the Court specifically about what the National Securities Clause is. Along in 1948 the question arose as to what would be done with a great deal of these, great number of these surplus plants which were scattered throughout the nation. They consisted of shipyards, ammunition plants, tank manufacturing plants, aircraft engine manufacturing plants, and also plants which had to do with manufacturing of war equipment. All of these plants had been transferred to the War Assets Administration for the purpose of selling or dispos-

ing in some form. They were, of course, of great expense to the Government to hold them. They were deteriorating very rapidly, but some persons, particularly the three services, got together and, I mean, the Army, Navy and Air. At the time of this, got together, as I said, and decided to hold some of these plants for sale with the idea in mind that they would be used in a future emergency.

This all happened in the so-called Unification Act which was passed; that was passed in July of 1947. I might say to your Honor that I spent more than a year working on that Unification Act at the staff level in Washington as a commander of the Liaison Division in the Air Force, so I am quite familiar with the Unification Act of 1947, properly known as the National Defence Act of 1947. [12]

Your Honor will recall of reading about that Act at the time. That was the first time in history that the three services had been combined into one unit, so to speak, in which the Secretary of Defence was the head. The office of Secretary of Defence was created by that Act. The integrity of the Army and Navy were preserved. The Air Force was split away from the Army and was made into a separate department.

After that Act had gone along and administered for a while by Honorable James Forrestal, who was appointed the first Secretary of Defence, the Army, Navy and Air, all got into a squabble about what they could hold, and this property which had been transferred to the—these plants which had been transferred to War Assets for sale, the Army was contending that the Navy was privileged over the

Army and the Air Force contended that some fields which they had should be retained, and it was a matter which was largely in the hands of the Secretary of Defence.

I am sorry that I don't have the reference to the Code of this Act of which I have a printed copy before me, but I can get it for the Court.

The Court: You have it there, Mr. Peckham?

Mr. Peckham: Yes, this is the '48 Act.

Mr. Neblett: Now, you are talking about Public Law 883, which is a 1948 Act. I am talking about the National Securities Act of 1947, because that is the start of this proposition. [13]

I think I am going into some detail, your Honor, but I doubt if I can explain the National Securities Clause to your Honor without going into this detail. The National Securities Act of 1947, the so-called Unification Act of the armed forces was approved July 26, 1947. In that Act there were Section 201, the National Military Establishment was, of course, first organized; Section 202 of the Act provided for a Secretary of Defence who would be the head of that department and his general powers were to administer the other three departments under his control. His powers have been very greatly expanded by the amendment to the National Securities Act of 1949. But that came after these transactions we are discussing now and I think it has no application for that reason.

One of the principal reasons we had for working out—I mean all of us who worked on this Act—it doesn't bear too much resemblance to the one we

prepared in the Department of the Air Force, Army and Navy at that time, because Congress hashed it up pretty badly when it got before it. But the principal thing, that was the form of it, unification of the armed forces, was that it would save money. There was a lot of talk to the public about we are starting another Pearl Harbor and all that, but that is just the atmosphere in order to get the public interested in going along with unification.

The Unification Act, as first suggested to the Congress by President Truman in 1945, in a message to the Congress in December of that year, and then all the sections went to work and finally came up with an Act which Congress worked over for a little over a year, 18 months, and finally passed it in the form that it now bears. As I said before, the business of having the Secretary of Defence in an overall command, so to speak, was to take away from the generals and admirals holding on to so much property they would never have any use for and to save money for the government.

In the Industrial Reserve, which counsel for the Government has told your Honor, there is \$9,000,000,000.00 of cost price property—\$9 billion dollars—and most of it is in a tumble-down, worn-out, dilapidated state and rapidly deteriorated since they were closed in 1945.

Well, the Secretary of Defence, his powers in the first Act are mostly financial and property. He had very little, he had no power on strategic concepts in either one of the three services created by this Act. In 1948—I am going to attack now the motion to

dismiss the complaint—1948 what is known as the Industrial Reserve Act was passed and that is how the National Industrial Reserve was created. That is known as Public Law 883, 80th Congress, and found in the Sections given you by counsel for the Government, 50 USEA, Appendix—it is in the Appendix, Sections 451 to 460. [15]

Now, that Act was approved July the second, 1948. That is an important date in connection with the allegations in this complaint.

At this time when this Act was passed and when arguments were going on before Congress, there was that idea in the air in which the Navy would hold everything it had, whether worthless or not; the Army the same thing and the Air Force would do the same thing. In the investigation leading up to the Act for its passage, 6,000 McClellan saddles, cavalry saddles, were found in Honolulu held by the cavalry for use in some future war. I don't know what they were going to do with these. I call the fact, I just mentioned the fact, that there is lots of property which was just about as useful as these cavalry saddles, although the cavalry had been abolished, or put the cavalry on wheels by this time, the horse cavalry had been abolished.

There was a great deal of publicity in the papers around Washington, each contending for its place in the sun and holding on to this equipment, land and other properties which they had scattered throughout the nation, of which Oakland Dock and Warehouse Company, known then as the Moore Dry Dock, West Yard, was a part.

There is a great deal of confusion in the pleadings. I hope your Honor does not think I am facetious when I say why there is so much confusion in the pleadings, is that [16] those were drawn in Washington. I hope your Honor will pardon me, I don't mean to be facetious, I don't, I am stating a fact. The affidavit is clear enough, I think that was probably drawn here. I can tell that was drawn here because it is on lined paper, I know the rules here, it is on lined paper.

Well, then, I shall go into my motion to dismiss with the consent of the Court. Here we have Public Law 883. This establishes the Industrial Reserve. Nobody claims we had any Industrial Reserve prior to Public Law 883 established, approved July 2, 1948. Now, that law says that the policy of Congress is that, Section 2, that the United States be provided adequate measures wherein the effectual nucleus of government industrial plants and equipment may be assured for immediate use to operate the needs of the armed forces in time of emergency or in anticipation thereof. It is further the intent of Congress that such government-owned plants and such reserves shall not exceed in number or kind the minimum requirements for immediate use of a national emergency.

Why was that put in there. I might say to your Honor that I sat in some of these, in on this testimony in connection with this Act, and was quite familiar with it while it was going on leading up to its passage. And the reason that the government-owned plants and such reserves shall not exceed in

number or kinds the minimum requirements for emergency use in time of the national emergency was due [17] to the fact it was known at that time what a terrible weapon the atomic bomb was. It was known at that time that we had attained in over-running *Germany rocket*, which is known as the Trailer or Seeker Rocket, has about 500 miles range, and has an average speed in a trajectory of 3500 miles an hour, and you fired it on the ground in the general direction of an airplane and knock it down like bird-dog retrieving a partridge, by an electrical control guiding it to the target.

It was known that we had a hollow shell and cannon to fire which will if—you don't have to fire it against something, but take 6-inch shell and lay it on the—sit it down and set it off and it will *go 18* inches of the best manganese steel armor in the world and 48 inches of concrete. And then we also knew that we had attained from the Germans the B-2, which is an ideal atomic bomb carrier, you don't have to send anybody with it, it too has a speed of 3500 miles an hour in its projectory and its range is limitless with certain additions to fuel.

The reason Congress put that in there was to keep these services from holding a lot of stuff that wasn't worth anything to anybody, and that is the position we are in now. We are spending \$15,000,000,000 a year to maintain a force which is 1/40th, 1/40 of which goes to these weapons I am telling you about. So that was established as a policy, the [18] minimum requirements in time of an emergency.

Well, it is known now that we will never build

another ship of the type that was built in this yard. I am going into that a little later, but leading up to it, going to Public Law 883, to keep these services from getting and holding on to all these plants individually, the Act placed sole responsibility on the Secretary of Defence. That was the reason for it. They knew that the generals in the Army would hold on to everything they had. And now, I like all those gentlemen, who are all my friends, from the top down, personal friends, but I don't agree with on the defence set-up they have and I have said in other forums besides this Court, and coming down to 1948, the Navy was trying to hold on to the shipyards, the Air Force was trying to hold on to the airports, and its planes of World War II vintage, and the Navy was trying to build carriers and so forth, and the Army was building a lot of tanks, so the Congress finally said this is all confusing so we will place this responsibility solely on the Secretary of Defence. And what happened?

Paragraph 3C of the Act provides that the term National Securities Clause, as used herein, means those terms, conditions, restrictions and reservations heretofore formulated or as may be formulated in Section 42 hereof for insertion in instruments of sale or lease of property determined in accordance with Section 41 to be a part of the National Reserve [19] which will guarantee the availability of such property for the purpose of National Defence at any time when availability thereof for such purposes shall be deemed necessary by the Secretary of Defence.

Now, Section 4 is very important. To execute the policy set forth in Section 2 of this Act, the Secretary of Defence is hereby authorized and directed—I emphasize those words— authorized and directed, 1. Determine which excess industrial properties should become a part of the National Industrial Reserve under the provisions of this Act; and 4, designate what excess industrial properties shall be disposed of subject to the provisions of the National Securities Clause.

Now, one of our main points on this matter, your Honor, is that the Secretary of Defence——

The Court: I didn't hear that.

Mr. Neblett: One of our main points is that Secretary of Defence has never designated, has never determined that the Moore West Yard should be in the Industrial Reserve. He has never made the determination.

And number 4, sub-paragraph 4, that has never been designated that excess industrial property, namely, Moore Dry Dock West Yard, to be disposed of subject to the National Securities Clause. Never did determine one of those. So we start on no case whatsoever on the part of the government. Why do I say it? We *will the* allegations of the complaint. The [20] allegations of the complaint are—keeping in mind that the Secretary of Defence is the person authorized to do that. And now, I have collected quite a few cases, United States Supreme Court, California, and some others, all of which hold that when a particular officer is designated to exercise discretion under an Act of a Legislature that his

powers cannot be delegated. I don't mean by that, your Honor, that the Deputy Secretary of Defence couldn't do it. I don't mean that, because we know a Deputy may exercise the prerogatives and discretion of his principal, but the Secretary of Defence could not delegate his authority under Public Law 883 to the Munitions Board. I have the cases here, quite a few of them.

The Court: Are they in the brief connected with this motion to dismiss? Are those cases you are just about to refer to in the brief connected with the motion to dismiss?

Mr. Neblett: Not these two or three I was going to give your Honor at this time. They are not in the points and authorities.

The Court: Yes.

Mr. Neblett: These three, I'm—the first one, the first statement is from 46 Corpus Juris, page 1033, section 291: "An officer to whom a discretion is entrusted cannot delegate the exercise thereof."

That principle is upheld very strongly in the old case of [21] Stockton against Creamer, 45 Calif. 643.

One of the best cases on the subject is Ontario Knitting Company against the State of New York, 205 New York 409, page 416; 98 Northeastern 909. A strong case, U. S. Supreme Court, Gaines against the Secretary of the Interior, 7 Wallace 347.. 19 Law Edition 62. Another case on the U. S. Supreme Court is York against the Secretary of the Interior of the United States, 275 U.S. 175, 69 Law Ed. 561; and an Aide Society against Reis, 71 Calif. 627 at page 634 it is said: "When a discretion is by law

conferred on a specific officer, said officer must exercise that discretion personally.”

It is alleged in the complaint that on June—July the third, 1948, the day after Public Law 883, the Industrial Reserve Act, went into effect, that the Secretary of Defence delegated all of his powers and authorities under him to the Munitions Board. And that we contend he had no authority whatever to do under Public Law 883, because the discretion was wholly in him as Secretary of Defence. But the greater fault in that appears in the complaint. The complaint alleges in effect that this property, Moore Dry Dock West Yard, was designated as a part of the Industrial Reserve. Well, that designation came on, that designation of which they claim came on April 8 and May 7, 1948, before the Industrial Act was ever passed, the Reserve Act was ever passed.

There isn't one word in this complaint that after the [22] Industrial Reserve Act was approved, July 2, 1948, that this property was ever designated by the Secretary of the Defence as a part of the Industrial Reserve or that it should be sold subject to a Securities Clause. Not one word. They do set up a letter—they do allege that it was designated before the Industrial Reserve was created, and how was it designated? By a trust release. All we have to sustain that is a trust release. Now, of course, if we get into the evidence of this thing I am going to object, and I think with some force, to the admission of such things as trust releases put in evidence to establish a discretion.

What do we have? We have this trust release

here dated April 8, 1948, for immediate release and it says—it is attached as an exhibit, it is a part of Exhibit 2 to the complaint, and it starts out, War Assets Administration Memorandum. The following is the text of the statement issued by the Assistant to the President April 8, 1948, for immediate release.

I know that the Military Departments have gotten so that they think they can do most anything, but I don't think it is to be believed that they can pass, make directives which affect the property of the citizens of the State of California and any other state of the union by issuing a press release. We have gone a long ways in government and [23] have made a lot of changes, and I have been following in those changes myself, but I never have gotten down to the point where we could determine the discretion by some other public official by a press release when the Act under which the authority was created hadn't been passed until three months later it was passed.

The next thing that they claim is that this press release issued—the Assistant to the President of the United States, don't say who it is. Everybody doesn't know who the Assistant to the President of the United States is. He has a lot of assistants. Now, a letter, which is Exhibit 2 to the complaint, which I wish your Honor would refer to, and it is a letter written by P. W. Timberlake, Major General United States Air Force, in which he tries to make disposition of some property belonging to the Navy. I am a pilot with long experience in the Air

Forces myself, and I know how we were treated by the Navy and we know how we treated the Navy, so I don't hardly think this is—from that standpoint maybe I am getting facetious again—but that letter is written on the Military Establishment Munitions Board of Washington.

Now, who in the world is Timberlake? I happen to know him personally, I have known him for years, but who is he? He is one of 650 who hold General and Admiral ranks in the Army and Navy and Air Force today. Six hundred and fifty of them. I might as [24] well have signed that when I was there, when I was in the Liaison Division of the Air Force. I could have signed that William H. Neblett, U.S.A.F., and have just as much effect as this has, and besides, that was creating a reserve under an Act which hadn't been passed.

The Court: I notice that it says attached hereto the tentative list of 114 facilities now considered necessary in the national defence and as a consequence should be disposed of under the National Securities Clause conditions. It is for the National Securities Clause conditions, those contained in the Act in 1948?

Mr. Neblett: Well, that is a Securities Clause under which we bought the property, that is the Act of July 2, 1948. The Act hadn't been passed.

The Court: I understand, but I am just asking, the National Securities Clause conditions referred to therein, were they in effect previous to the Act of July, 1948, in any way?

Mr. Neblett: There was some property that had been sold under the National Securities Clause which rose under Public Law 34, which I think is referred to here in one of these documents, 634, which is referred to in the press release of April 8.

The Court: What is the date of that?

Mr. Neblett: That Act, that law was—my recollection [25] is that law was passed some time in 1947. I have a reference to it here somewhere, but it is Public Law 364 of the 80th Congress. Congress passed it in 1947 prior to this date.

The Court: And did it provide for the Securities provisions being inserted in bills, say on deeds, and so forth?

Mr. Neblett: It did in effect, your Honor, provide for that; yes. The Public Law 364 was quite different from Public Law 883 and it was the unsatisfactory condition of Public Law 364 which led to the adoption of Public Law 883. That was called a leasing act. It is known as the Industrial Leasing Act for the armed services and as I said, my recollection is somewhere in the middle of the year 1947; I don't remember the exact date. But Public Law 883 came along and that law specifically placed it all under the Secretary of Defence; Public Law 364 did not. The Secretary of Defence was not mentioned in there. It was only the War Assets that could sell it subject to the Securities Clause.

The Court: I understand your first point to be at the time that this act was—July 2, 1948, was an act under which these properties were to be des-

ignated and that there wasn't any designation made of this particular property or any designation that it should be disposed of with the security clause in it; that is correct, isn't it? [26]

Mr. Neblett: That is so, I mean, no designation made after the Act was passed.

The Court: After the Act was passed.

Mr. Neblett: That is correct.

The Court: And your claim is then that therefore even though those provisions were in the bill of sale that that wouldn't be binding upon you, is that correct?

Mr. Neblett: No, sir, I don't contend that. I think, I believe that if the—well, I will withdraw that statement and say it this way: There was no authority to put it in the bill of sale if the property was never designated by the Secretary of Defence, because that deed was a year after, a year after Public Law 83.

The Court: Suppose there had been no law of that kind at all and no law creating any of the security provisions; suppose you people come along and made a deal with the correct Government officials to take over this property and took it with certain conditions, wouldn't those conditions still be binding?

Mr. Neblett: Yes, your Honor, no doubt about that; you are right about that. That is another point. I think that the Government—what I am making this argument is that the plaintiff alleges that what we have done violates the public policy as established by Congress in Public Law 83, and

I am making argument to show that no public policy has been established [27] with respect to this piece of property under Public Law 83. That is my purpose. Then, the most substantial point I have is that the conditions and bill of sale mean nothing.

I agree with the Court that if the Government had the restrictions, conditions in the bill of sale, regardless of any security clause, if they were good conditions, the Oakland Dock and Warehouse Company would be bound by it, but there hasn't been much disagreement: I don't like to refer to arguments I have had outside of the courtroom, but I think I am justified in, since I have shown it in the affidavit anyway, that we discussed this matter considerably back in Washington in the last two weeks with the Navy Department and with the Attorney General's Office, and I might say that they, I will say that they were fairly weak on the point that the conditions and restrictions don't mean anything unless coupled with the idea of public policy, and I think it was due to my talks to them that they put in here, tried to show that the property had been designated and therefore one general overall public policy which transcended the laws of California with respect to California and transcended all Constitutional provisions which had to do with contracts or rights, because this was a contract matter with the Government.

Now, that is what I think that was the reason it was put in the Complaint.

But our main point here, your Honor, is that after

meeting [28] this, I think tried to meet this public policy point, our main point here is that this is a complaint brought to enjoin the sale of property, personal property.

I might cover the facts a little bit here, because I don't see how Counsel for the Government became as familiar with them as he did with the short time he had to work on them and there may have been a few errors in his statement which I would like to point out. The Moore Drydock Yard consisted at the beginning of about 96 acres; something like that. Around 52 acres of it, the west portion was owned in fee by the Government. The Government acquired that in fee by purchase with some conditions. That is the piece that the Oakland Dock and Warehouse Company bought. The eastern portion, or about 44 acres, say, is owned by the Western Pacific Railroad and is under lease from the Western Pacific Railroad to the United States Government on an annual lease with provisions for renewal and we contend that the lease is void for certain reasons that is not part of the Complaint.

Now, the Government tried to sell this whole yard of the Western Pacific Lease upon which ways are built, and the ships were floated next door to the part now owned by Oakland Dock and Warehouse Company and there are what they call outfitted. It has six piers on it and the building ways, are five building ways and six outfitting piers. While the Government tried to sell it all in one bunch, but it wasn't able to do it because [29] nobody would take over the Western Pacific lease. Then finally the

Government split a part of the yard into the fee portion and sold the fee portion at public auction to the Oakland Dock and Warehouse Company. Negotiations were going on about a year between the various parties before the Oakland Dock and Warehouse Company actually purchased it.

And the security clause mentioned in General Timberlake's letter was applied to the whole yard, but never applied to the whole part the Government sold to the defendant. On that point I repeat myself, because of the hounding I took in Washington. This was something different. It was a great policy established by Public Law 883. The public policy argument doesn't count.

Now, I would like to say one other thing I didn't cover. When the Government conveyed this property to Oakland Dock and Warehouse Company—I am quite familiar with it, because I handled it for the company and sat in on the conferences and was also the one who approved the title instruments which were finally given us. This is an unusual transaction in that the Government, usually in the sale of its industrial equipment and lands, the Government makes a combination quit claim deed and a bill of sale, and then takes back a trust deed on the whole for security of the balance of the purchase price, if it isn't all paid at once. Our company didn't pay it all at once. It paid actually \$240,300 in cash and gave back a note for \$961,200 with 4 per cent interest payable in twenty equal annual [30] installments of \$48,060 each, interest

and principal payable on June third of each year in equal installments. So a quit claim deed was given to the company for the real property and the improvements on the real property, that is real property by description. And a security clause of certain—that was void in itself. We don't have to go into that because that is not involved. The security inserted in the quit claim deed in which the Government said in its quit claim deed it reserved dormant estate for twenty years. Frankly, I am probably quite a bit older than your Honor and I have practiced law for a long time, but that is the first time I had heard of a "sleeping estate." I don't know what it means, but anyway that is what it said. And all the law experience I have had that is the first time I have heard it.

Then we had the Government give us a bill of sale to the machinery, tools and equipment separate from the quit claim deed. Now, we gave back a deed of trust on the real property to secure the whole note, \$961,200, and also gave back a chattel mortgage to secure the note on the machinery, tools and equipment with release provisions on the chattel mortgage that all this equipment would be released upon the payment by the purchaser of \$366,660, which was established by the Government in the chattel mortgage as a fair value of the property.

The Court: You mean a partial release, or a general release?

Mr. Neblett: That was a general release. I think that [31] is so important I might read that to your Honor. That is exactly what that clause provides.

It is paragraph three in the chattel mortgage. It reads as follows: "The mortgagee agrees"—the United States Government—"to release all the chattels from the lien of the chattel mortgage upon the payment by mortgagor to mortgagee the sum of \$366,660, which sum has been established as the fair value of said chattels. The mortgagee will also release a part or any portion of said chattels upon the payment by the mortgagor to mortgagee of the fair value (fair value to be established by mortgagee) of the property to be released. All payments so made shall be applied against the unpaid balance of the total indebtedness of \$961,200 in the inverse order of maturity, as specified in the terms of the promissory note of even date."

The Court: That is a partial release, of course.

Mr. Neblett: Yes. That is what the Government complains about. We have been obtaining partial releases from the Government right along by the payment of the fair value which they established on the equipment released. We have filed, by the General Services Administrator, the releases recorded; that is what the Government is complaining about.

But now to go back to the form of this argument I wish to——

The Court: It is 12:00 o'clock and I have a conference with two of my colleagues about another case at a quarter after 12:00, so I think I will have to continue this matter until 2:00 o'clock. We will recess now. [32]

Mr. Neblett: Very well.

(Adjournment until 2:00 o'clock p.m.)

Friday, June 16, 1950—2:00 o'Clock, P. M.

Mr. Neblett: I would like to open my argument this afternoon by asking your Honor to turn to the Complaint and particularly Paragraph Three. This morning, Counsel for the Government mentioned the fact that the quit claim deed on this property had been modified. That is correct. His date was in error. The date was February 28, 1950, that the new quit claim deed was modified, the quit claim deed was executed by General Services Administration.

As your Honor knows, this property was sold to the Government and the deed executed by the War Assets Administration. The War Assets Administration, the Act under which the War Assets Administration operated was repealed as of July the 1st, 1949, and the General Services Administrative Act took its place, and the General Services Administration now has all of the functions that were formerly conferred upon the War Assets.

This bill of sale which is attached to the Complaint and possibly quoted in Paragraph Three of the complaint, is the instrument upon which this action turns with the assistance, say, of the chattel mortgage.

The Complaint in general is a complaint for an injunction and it has the prayer for damages, but no damages alleged in the Complaint. I don't know just how, in our motion to dismiss, I should go on arguing the questions of injunction, but we do [34] know that in California——

The Court: In California, in any other equity,

the rule is, one of the essential things to show in an injunction case is irreparable damage during the delay. That is one of the things, isn't it one of the elements?

Mr. Neblett: Yes.

The Court: Other elements, of course, bearing on the question of convenience or equity, you might say. Is there any allegation in the Complaint to the effect that this defendant in this case is insolvent and unable to pay any damages that might be secured by virtue of any violation of the contract?

Mr. Neblett: No; no such allegation and no such allegation could be sustained if it were made, so I think that is why it wasn't made.

The Court: Of course, it may be claimed by the Government that this reservation here was for the purpose of enabling that plant to be put into immediate war time use in the event of any national emergency, and if you people keep on selling off this equipment and these machine tools, it may not be in the condition that they want it contemplated by the reservation in the bill of sale. That would be probably irreparable damage. It might be.

Mr. Neblett: That is the policy, the national policy on which I tried to reach this morning.

This Complaint first sounds—is plainly—the purpose [35] of the Complaint is to prevent what the Government calls a breach of contract. We say there is no contract which we can breach and that I am going to argue in a moment, but to start off with, this injunction is purely sought for that purpose.

Now, Section 2423 of the Civil Code of California,

Subdivision 5, says: "An injunction cannot be granted"——

The Court: Which Section is that?

Mr. Neblett: 2423 of the Civil Code, and it is Subdivision Fifth. That reads: "An injunction cannot be granted:" —for certain reasons expressed in first, second, third, fourth and fifth—"Fifth, to prevent the breach of a contract, other than a contract in writing for the rendition or furnishing of personal services from one to another where the minimum compensation for such service is at the rate of not less than \$6,000 per annum and where the promised service is of a special,"——

The Court: That was to cover the movie business.

Mr. Neblett: No use of my reading any further. We know when that was adopted and the reason for it, and the general proposition and the specific proposition is that an injunction cannot be granted to prevent the breach of a contract. That is all this section is, is to prevent the breach of a contract.

No damages have been alleged in the Complaint. However, there is a prayer for damages attached to it, not any stated amount, but a prayer for damages. I suppose that Counsel for the Government will go along with me on the theory that the [36] prayer is no part of the Complaint. The allegations in the Complaint are particularly for injunctions, further breaches, or alleged breaches of this contract, namely, the bill of sale.

We, of course, contend that there is no breach of the bill of sale and our reason for so contending—reasons for so contending is that the bill of sale

provides that the War Assets Administration, acting pursuant—the War Assets, the United States of America through the War Assets, acting pursuant to reorganization plan one of 1947, and the powers and authority contained in the provisions of the Surplus Property Act of 1944 and the W.A.A. Regulation No. 1, as amended, “does hereby sell, transfer, assign and deliver unto Oakland Dock and Warehouse Company, a corporation duly organized and existing under the laws of the State of California, vendee, the following described chattels:”

And it describes the chattels, that description is not specific, but that agreed description that we, the War Assets and the defendant here, the vendee, knew what it was, and no question of description of conveying on that piece of property or of the chattels, which consisted of machinery tools and equipment to the vendee.

We were discussing Public Law 883 this morning, but your Honor will see that no mention of Public Law 883 is made, and that is a propos, and the question that was asked just before we left, if there had been no documents and still the Government had conveyed it upon us, upon the chattel mortgage valid [37] restrictions, that the restrictions would be of *just much* force and effect whether there was any Public Law 883 or not. I think that is a propos of the allegation made by the Court.

“Said chattels were duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and W.A.A. Regulation No. 1 as amended.”

There is no question about the fact and no question raised in the Complaint, anywhere else—in fact, it is alleged that this quit claim deed, or this bill of sale—I don't mean the deed, the quit claim deed is not involved; it might be in evidence, but not involved in this motion I am now making. And this quit claim deed conveyed all of the right, title and interest of the Government into these chattels, to the vendee, the Oakland Dock and Warehouse Company.

Now then, I think it is necessary to read some of these paragraphs. Well, before that: “to have and to hold the same unto the said vendee, its successors and assigns, without representation of warranty, express or implied, as to title or condition thereof, subject to the following covenants, restrictions, conditions and reservations:

“One. The Government-owned portions of the Moore Dry Dock Company West Yard, Oakland, California, hereinafter referred to as the ‘plant’ in which the above-described chattels are located, is considered a War Reserve plant and as such will be of vital interest to the Nation in the time of emergency.” [38]

Well, that recital is a rather vague one. Then it recites that the ground which was conveyed to us is a War Reserve plant. In other words, the ground which was conveyed to us is the plant in which the above-described chattels are located and considered a War Reserve plant.”

Now two. “Two. In a quit claim deed, of even date, and delivered concurrently herewith, whereby

the vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the vendee herein, the vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each."

Again referring to the real property which was conveyed and not to the machinery, tools or equipment, no reference to them. I am trying to point out to your Honor the Government hasn't reserved any right to that, to take back this property. I can't find anything in the bill of sale which gives the Government any right at any time to take over possession of this property.

The Court: I was the attorney for the Bank of America for twenty-five years before I came on this bench a year and a half ago. I never in all that practice, never heard of a dormant estate. I don't know what provision of the law under which that is created, exists; never heard of it in Blackstone, or in any real property book I have ever read. [39]

Mr. Neblett: My experience has been the same as your Honor. This is my first acquaintance with the word "dormant estate," I have never heard of it before I came in contact with it here, and of course, I contend that it is a term that isn't definable in law. I suppose it means "sleeping estate." That is what the word dormant generally means, something generally asleep.

The Court: Reserve the right to forfeit the estate granted in the event of violation of conditions subsequent, and you can do all those things, but what a dormant estate is, I don't know. Maybe Mr. Peckham will be able to enlighten me.

Mr. Neblett: I would be delighted if I could, but I have studied this question very diligently. I don't know whether I understand it better than anyone else, but I do claim I have studied it harder than anyone else, this whole problem, and I have been unable to find anything that remotely defines in any dictionary, any case. I have looked it up very carefully and I don't know what dormant estate means. You can find in the law definitions of a dormant person. It means a person that is in a state of—well, it is a sort of amnesia or sleeping sickness, or something of that sort. That is the way to define a dormant person, but the dormant estate——

The Court: At any rate, you are making the point now there is nothing in this bill of sale which gives the Government the right to take it back? [40]

Mr. Neblett: That is correct, your Honor.

The Court: No reverterary interest of any kind.

Mr. Neblett: No sir, just—here is the only restriction upon which this suit is borne. That is found in Paragraph Three.

“Paragraph Three. The vendee for a period of ten years from the date hereof——” that is June 1, 1949——“will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction,”—let me stop right

there and say these three Secretaries, it is evident from Public Law 883—neither one of those Secretaries have any jurisdiction, so that means the Secretary of Defense, of course. My construction of it is that one of the Secretaries, means that the Secretary of Defense, but we haven't seen any action on the part of the Secretary of Defense.

Quoting further: "sill not, * * * remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment,".

Now, that is a very vague paragraph, but it means that within the discretion of the vendee that he can sell anything he [41] wants, provided he complies with the chattel mortgage provisions. We don't contend we could sell without the release of the chattel mortgage, because the chattel mortgage holds it until a partial release is made to the satisfaction of the Government. Now, that means that we can dispose of anything we want to unless in our judgment the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed. Doesn't tell us what the plant was designed for. I suppose you would have to have evidence to support that, and unless replacement is made by equivalent machine tools or other severable production equipment. That would give us ten years in which to put it back. We would have ten years in

case we sold anything and it materially reduced the capacity of the plant, no showing it would do, plus we would still have ten years to put it back.

These things are the three paragraphs on which the suit is brought is quoted in the bill of complaint. They say the suit is founded on those.

The general conclusion as alleged in the Complaint that this sale of the equipment which the company has sold and for which it has obtained releases from the Government, partial releases from the chattel mortgage, the general conclusion as alleged in the language of the bill of sale that it would materially reduce the capacity of the plant to produce items for which it was designed and the replacement will not be made— [42] now, that puts that paragraph, seems to open it up, states no cause of action unless it were stated how it materially reduced it, the capacity of the plant, to produce the items for which it was designed, and the Government couldn't state this because this plant, this plant of a shipyard which was sold and split apart from the other half, can't produce anything. That is the reason the Government didn't allege that it materially reduced the capacity of the plant.

You see, your Honor please, the security clause has been placed on this plant, placed on the whole plant, and the ship building plant, and this is only half of the plant which builds the superstructure of the ships, as the hulls are built on the other part, the Western Pacific land and therefore, the plant this machinery wasn't designed to produce anything in the way of ship building or ship repairing, because

it is impossible to build ships. I mean, you have no ways there and there are no ways, only outsticking piers. The question comes up, when do we have to replace it? We have at least ten years unless replacement can be made, I think is what the contract means. But that again is just to point out to your Honor the uncertainty in the whole proposition, and the main point I want to make is that conditions against reselling where absolute title is conveyed is void in anybody's law. There is no exception to that. I have talked to the Department of Justice, the Department of the Navy and we have talked about this thing time and time again. [43] I asked them to produce any authority which shows we are wrong about that. And to date none have been produced. I am talking about the Department of Justice in Washington. I have talked to them about it, I have produced cases which I am going to give your Honor now, and over a period of years we have been discussing this thing. Up to this time I have received not one authority that we are wrong.

Now, I am not saying this about my friend here, because Counsel for the Government, because I never met him until yesterday and he had the case very shortly, and I understand it was sent out to him about a week ago, and he naturally showed a great familiarity with it this morning in the short time he had to work on it.

This sets out the authorities we have cited in our motion to dismiss and it is based upon Section 711 of the Civil Code: 711. That Section reads: "Conditions restraining alienation void."

The Court: That is under the real property Sections?

Mr. Neblett: That is true, your Honor. But back in the Code it is said that property includes personal property and everything else. I can go in that further and show your Honor that property includes both real and personal property. That is so stated in the title of the Code in the beginning. I can look and find the Section that is necessary, but there is a New York case that holds that no conditions can be put upon [44] personal property because of its transitory character. I don't find any such cases as that in California, because California in the Codes lumps property into one element. I do find in California that sales of personal property with restrictions can only be made where there is a conditional sale and title is retained in the seller until the purchase price is paid. But there is no such thing known to the law of California where anybody has ever tried to impress restrictions, real estate restrictions on personal property because of the transitory character, I believe.

But that reads: "Conditions restraining alienation, when repugnant to the interest created are void."

No question about the fact that interest created here is absolute title as alleged in the Complaint, that the title was made to the vendee. And here we have some machinery over there which it is common—I think the plant was built in 1942—and it is common knowledge that plants of that type were supposed to have a life of four years. That is, the

Navy's estimate of complete depreciation on a plant of that type—four years. The plant is now eight years old. It has served a double life already. The civilian—it is common knowledge that civilian depreciation on that allowed on plants of this type, allowed by the income tax people, is seven years. The income tax department permits you to depreciate such machinery, tools and equipment and plants of this type in seven years, complete [45] depreciation. The Government is twenty-five per cent a year—I mean, the Federal Government, the Navy Department and so forth, but this other branch, seven years' life by the Treasury Department.

The only thing we have here is a complete conveyance of title and they are trying to tell us what they are going to do with it, can't sell it, can't dispose of it according to them, let it stay there for ten years. By that time it would be worth nothing to anybody. In the meantime we pay taxes.

The Court: There might be something in what you say in regard to real property, but I am not sure that that rule of the repugnancy to the transfer and delivery is applicable to personal property.

Mr. Neblett: Well, I think your Honor, that I can answer that question.

The Court: Couldn't I transfer some shares of stock that I own to one of my children and still provide in the transfer that while they have the absolute title they can't sell them for ten years and they shall pay me during that ten years, pay me the dividends therefrom?

Mr. Neblett: I think that would be a father and

child agreement, if the child would observe it, the child probably would observe it, but if you conveyed I think possibly that would be a little better if it was outside of the family, because that would involve family agreement. But it certainly, [46] if you conveyed to me some stock the restriction would be invalid. That is, if you, as a fatherly consideration, that I was to pay the dividends, that would be another point, because that would be giving me an estate——

The Court: I would be giving you a remainder of that estate, ten years, that would be.

Mr. Neblett: And you reserve the dividends for the ten year period?

The Court: You agree not to sell the stock during that time. Nothing illegal about the transaction.

Mr. Neblett: I don't think that transaction is similar to this one, because in this transaction we don't pay the Government anything, the Government doesn't reserve the right to collect any money or anything. You reserve the right to collect dividends, which is an absolute reservation of a ten year estate for which that is a part of the consideration. But here we just have a blanket and very vague clause against resale.

The Government can never get the \$366,660 out of this, this entire personal property, because that is a provision in the chattel mortgage, for its release, partial and whole. I called your attention to the partial release and whole release section in the chattel mortgage this morning. The Government retains no interest whatever in it except to collect

the amount of money which is secured by that chattel mortgage, and the upset price, the top price of \$366,660, which is said to be the [47] fair value of the property on June 1, 1949. It isn't worth what it was on June 1, 1949, because it has another year's depreciation.

I think that I will turn back to this title of the Code to answer that question your Honor just raised. I have a case from California which I don't know whether I can lay my hands on right now, which says that the right and interest in personal property is the same as it is in real property. I mean, that is based on 654 of the Civil Code which reads: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others."

In this Code, the thing of which there may be ownership is called property. That is the same title under which 711 comes.

Now, Section 657 of the Civil Code: "Property is either:

1. Real or immovable; or,
2. Personal or movable."

So there is a case somewhere, I can't lay my hands on it right now, because I didn't think it was important. The rules under this Section, part one of the Civil Code covers both real and personal property and 711 comes in that division, as your Honor knows. So I believe that the cases with respect to real property are applicable for that reason to the personal property which I have just read to your Honor.

The Court: In that Code I think you will find, for instance, that you can't create a trust in real property except [48] by (life) and you can't create a trust for longer than the life of a person for twenty-five years, and you can't restrict the alienation of the property and create a perpetuity in real property, but I don't know of similar provisions with respect to personal property. In other words, you remember the old saying you can have a trust—you wouldn't have a trust to convey that was real property, but you could have a trust of personal property, create a trust in personal property by an oral agreement; you can't do that with regard to real property. Similarly, there are distinctions between real and personal property.

Mr. Neblett: Well, a distinction between personal and real property as to the creation of a trust arises out of the Statute of Frauds which prevents your creating an interest in real property for more than one year, whereas you can create an oral trust, you can make the agreements about personal property for more than a year provided you deliver——

The Court: So many decisions between real and personal property and the treatment thereof in the Code that I am just wondering whether or not the fact that this, these conditions in the bill of sale which seem pertinent to the transfer of title to the property, whether or not the provisions of the Civil Code make that invalid with regard to transfers of real property apply to transactions like this; if you follow me. In other words, one giving, dealing in personal property here, just [49] wondering whether the same reasons that might make a transfer of real

property with provisions make the bill of sale invalid.

Mr. Neblett: Undoubtedly the real property, the original deed, original quit claim deed, was void for the same reason, your Honor, undoubtedly. But the original quit claim deed with reference to the real property was modified and I think the modification is probably valid.

The Court: That is not what I am saying. You quoted me provisions of the Civil Code in the State of California which deal with real property and your arguing that these conditions in this thing being repugnant to the bill of sale are void; therefore, they are not binding on your client on the ground that they are repugnant to the bill of sale which you are—supposing you transfer absolute title to your client, and I am asking you if it might be true in respect to real property, that principle. I don't know whether it is true with respect to personal property or not.

Mr. Neblett: Well, I don't say that the case which says that there is no distinction between real and personal property at this moment, but there are such cases in California, no distinction under the Code, these Sections, Division 7, part one and two of that, real property and personal property, regulated by the same rules, 711, "conditions restraining alienation. when repugnant to the interests created are void."

Now, that—— [50]

The Court: That is, that deals solely with real property, does it not?

Mr. Neblett: No, your Honor, it deals with both, it deals with property, and those two sections I have just read to you——

The Court: Yes.

Mr. Neblett: ——say that property is either real or immovable or personal or moveable. That same title refers back, of course, this Section is made in the light of that Section 657. Section 711 follows 657, because it refers to what are real or personal properties, that is the way property is defined, and these restrictions are applicable to property in general, whatever its character. But I agree with your Honor that restrictions, conditions, covenants and so forth will occur in real property probably 95 per cent of the time that they do occur at all. I agree with your Honor on that because it is impossible, really, to make any sort of life estate in something such as a piece of machinery or something of that sort; it isn't good business to do it. I think that is the reason it doesn't happen any oftener, and, for instance, I sold an automobile to one of these gentlemen in the court now, and I conveyed it to them and he paid for it, I gave him the pink slip and he paid me for it, but I put a condition on the pink slip that he couldn't haul a trailer behind it and he couldn't drive it out of the County of San Francisco and he couldn't sell [51] it for a period of ten years, of course, that would be invalid on the face of things, even invalid in common law, regardless of the Code. And that is what Judge—Justice Henshaw said in one of these cases. Of course, this case was applicable to real property, but the language is very im-

portant. This is the case of *Bonnell versus McLaughlin*. It is 173 *California* at page 214. Judge Henshaw said:

“The deed of McMahon to these defendants was, so far as is here important, in the following language: For a money consideration expressed as being ten dollars, McMahon ‘does by these presents grant, bargain, sell, convey and confirm, unto the said parties of the second part, and to their heirs and assigns, forever, subject to the conditions herein named, all that certain lot, piece or parcel of land,’ etc. ‘This grant is made upon the express condition and limitation, that said second parties, or either of them, shall not sell, hypothecate, mortgage, convey, or alienate the whole or any portion of said premises during their natural lives, but they may make testamentary disposition of the same. Together with all and singular the tenements, hereditaments, and appurtenances’—and so forth.”

Now, the Court went on to say:

“The general demurrer was sustained by the Court under the conditions subsequent contained a restriction [52] repugnant to the grant itself, and of the soundness of its conclusion in this regard no doubt can be entertained. In this State it has been declared that when the granting clause in a deed purports to convey title in fee simple and is followed by a clause prohibiting the grantee from conveying without the consent of the grantor, the latter clause is repugnant to the interest created by the former,

and being in restraint of alienation is void.
(Civil Code Section 711)''

and some other cases cited,

“the deed contained the proviso”——

quoting from another case——

“In *Maynard versus Polhemus*, the deed contained a proviso that if the grantee ‘should ever sell any of the vested property it should be sold to the said DePeyster.’ Says this Court, ‘construed as a covenant, it was merely personal, and not binding upon the heirs or assigns of Cooper.’ The condition ‘it is unreasonable, and contrary to the policy of the law, because in restraint of alienation.’ In *Prey versus Stanley*, the restriction was that the grantee should sell or convey no part of the land without the consent of W. H. Stanley. This restriction was not contained in the deed itself but was in form a separate covenant, this Court saying that the rule that conditions in restraint of alienation when repugnant to [53] an interest created are void (Civil Code, Section 711) ‘does not depend upon the mere form in which the restraint is imposed.’ It avoids as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; such covenants, if not within the letter of Section 711 of the Civil Code, are yet obnoxious to the policy of which that Section is a partial expression. The parties to the contract of February 23, 1892,

seem to have made the mistake of leaving the absolute title in Mrs. Stanley, and at the same time attempting to destroy an inseparable incident of said title.' As is pointed out in 24 *America and English Encyclopedia of Law*, Second Edition, page 868 et seq., and note to *In Re Walkerly*, 49 *Am. St. Rep.* 97, this rule is of well nigh universal acceptance. In the latter it is said: 'hence, if a deed or devise is attended with an expressed condition that the beneficiaries shall not sell or convey the property, no perpetuity is created, because the condition itself is void, and the fee and absolute power of disposition vests in him.' "

Your Honor would not be interested in any cases raising the rule of real property?

The Court: No.

Mr. Neblett: Because your Honor stated you are quite familiar with that and I think that is something which we are [54] all very familiar with, and of course——

The Court: The rule of restraint of alienation has been—comes down from Blackstone. We all ought to know that.

Mr. Neblett: Some question has been raised here that this property, we have raised, not here, but raised with me in all arguments beforehand, and I want to anticipate if I can. I have cases here to show, that this property, being in the State of California is regulated by the laws of California, and the law in respect to this property—I have had some objection to that in argument—but I have cases to

cite, many cases to cite, that cite the principal ones, they are cited in the motion to dismiss, in our points and authorities to dismiss—the principal ones being, well, I guess the best one is Los Angeles and Salt Lake Railroad Company against The United States, which was in 140 Federal Second 438, which was decided by the Circuit Court of Appeals of the 9th Circuit.

The Court: Let me have that citation.

Mr. Neblett: 140 Federal Second.

The Court: Page what?

Mr. Neblett: 438. But probably the leading case is Thompson against Magnolia Pipeline Company, 309 U.S. 476. Does your Honor have the Law Edition? Is that sufficient for your Honor?

The Court: That is sufficient, yes.

Mr. Neblett: Now, those cases and the other two were [55] cited in Paragraph three of the points and authorities on the motion to dismiss, on the motion to dismiss I stated the principle that the Federal Courts in a state, with respect to property, whether it is real or personal, with respect to that property——

The Court: I know that.

Mr. Neblett: Yes. As far as this point of digging up that case which holds that the rule is applicable to real and personal property being the same, I don't have that, your Honor, I don't have the citation here with me. I sometimes, I know we can have everything we can expect, but we don't run into something we hadn't anticipated.

The Court: Well, do you, so far as the purposes

of this motion are concerned, do you admit that the property over there is being sold by your clients?

Mr. Neblett: Oh, yes.

The Court: Advertised for sale, that is the equipment, and the property, moveable, property, that has been and is being now advertised by your clients for sale; no doubt about that, is there?

Mr. Neblett: None whatever.

The Court: Your claim is that you have a perfect right to do it under this arrangement here, number one, because this plant has never been designated under that Act of July 2, 1948, and therefore, not having been designated there is no public [56] policy involved in preventing your doing it?

Mr. Neblett: That's right.

The Court: Number two, no provisions in the conditions, and under these conditions you have an absolute title to the property and therefore these contentions are void on the ground they are in the restraint of alienation, and number three, that the clause depended upon themselves don't say when during the ten years you have to replace this equipment if you sell it, and certainly it wasn't intended that you should hold it all that period of time, because it would become obsolete, already obsolete, and furthermore, that said division three of the quit claim deed says you wouldn't remove anything which would reduce the capacity of the plant to produce the items for which it was designed, and half of the plant is already gone and the other half left, and it was designed primarily as a ship build-

ing plant altogether, and no ship building is going on there now, no ways, or anything else.

Mr. Neblett: That is right, your Honor.

The Court: And fourth, that this being an action, a breach of a contract, it is an action at law, not of equity, and therefore no injunction can be issued.

Mr. Neblett: Those are all the points I have made up to this moment; yes, sir.

Now, there is one other point that arises out of the chattel mortgage. The chattel mortgage is not attached to the [57] Complaint, but it is referred to in the Complaint and in the affidavits. That is an ordinary chattel mortgage form, not quite exactly like a California general form of chattel mortgages which your Honor is so familiar, but it is almost entirely in the same form, and I will have to repeat myself a little now, this chattel mortgage was executed and delivered at the same time that the bill of sale was executed and delivered; the whole transaction was consummated in one movement and at the same time.

Paragraph Three: "The mortgagee agrees to release all the chattels from the lien of this chattel mortgage upon the payment by mortgagor to mortgagee the sum of \$366,660, which sum has been established as the fair value of said chattels. The mortgagee will also release a part or any portion of said chattels upon the payment by the mortgagor to mortgagee of the fair value (fair value to be established by mortgagee) of the property to be released. All payments so made shall be applied against the

unpaid balance of the total indebtedness of \$961,200 in the inverse order of maturity, as specified in the terms of the promissory note of even date."

Now, the Government drew all these instruments itself, well known, no question about that.

The Court: Yes, I know.

Mr. Neblett: They drew them.

The Court: The one that drew it is to be interpreted [58] against, I know that.

Mr. Neblett: Now, Paragraph 9 of this chattel mortgage says this:

"Said mortgagor does hereby state, declare and warrant that it is the sole and separate owner of all the within mentioned chattels and that there are no liens or encumbrances or adverse claims of any kind whatever on the same or any part thereof."

Now, evidently the Government didn't think it had very much and required this to put this in the chattel mortgage warranting that we owned complete title to it, and the sales which have been made have all been released by the Department of the Government to whom it is assigned. The General Services Administration signed partial releases for all this equipment and the price has been paid.

If your Honor, at this moment, if your Honor is going to declare the afternoon recess, I think I can dig up that personal property case while at recess.

The Court: I can do that, if you can find it. I will declare a recess.

Mr. Neblett: I will see if I can find it.

The Court: For ten minutes. There is another point about this that strikes me—if I should grant this injunction—you might be thinking of this, par-

ticularly Mr. Peckham—if I should grant, refuse to grant this injunction and they continue [59] with the sales, since apparently there is no showing that they are not a very solvent concern, where would the irreparable injury be?

Now, I can anticipate your reply would be, well, the national emergency might occur and we would be just holding the bag. The answer seems apparently to be, well, this was never really intended, the policy, this particular plant was never designated after that, after July 2, 1948, as one of the security plants, and therefore it wouldn't be, that policy wouldn't be violated, couldn't be at any time.

You understand the point I am trying to express?

Mr. Peckham: I think I do, your Honor. I agree with your Honor that it is not a question of, for purposes of this hearing, though there may be some question, it is not a question of financial responsibility as if this were an action outside of the National Industrial Reserve Act. Of course, we don't agree with the contention of Counsel that this has not been properly designated so that we ought to begin from the premise that it was properly designated.

The Court: We will take a recess for ten minutes, and you can find that case.

(A short recess.) [60]

The Court: Did you find anything, counsel?

Mr. Neblett: I found something which I think answers the question. Certainly a good lead on it. It is the case of Ponsonby against Sacramento

Suburban Fruit Lands Company and it is in 210 Cal. 229. It arose under the Attachments Caption of the Code of Civil Procedure, Section 537 and sub-divisions of that Section, and the question presented was whether or not certain things were property within the meaning of the attachments sections, and the court said at page 232, "The question first presented is whether when a plaintiff has suffered damage by the fraudulent representations of a non-resident defendant, has he suffered an 'injury to property' within the meaning of subdivision 3 of Section 537 of the Code of Civil Procedure above quoted?"

Then the court says: "The answer to that question hinges on the proper interpretation of the term 'property' as therein used. The term is a generic one, and its meaning in any case must be determined by ascertaining the sense in which it was used. When unqualified the term is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate," citing the case of *Teschemacher vs. Thompson*, 18 Cal. 11, "whether corporeal or incorporeal," citing cases. "In 6 words and phrases, 5693 et seq. (first series) and 3 words and phrases, 1275 [61] et seq. (second series), are to be found many definitions of the term amply supported by authority. The following are typical:

"Property signifies every species of property. It is nomen generalissimum and comprehends all a man's worldly possessions.

"In its proper sense properly includes every-

thing which goes to make up one's wealth or estate.'

"In *King vs. Gotz* at page 240, determined to find as 'including all that is one's own, whether corporeal or incorporeal.'

"We find no reason to believe that the Legislature did not intend to use the word in the above broad and comprehensive sense. There is nothing to qualify the expression either in the Code section in which it was used or in any other related section. We are of the opinion, therefore, that the expression was so used in this statute. It therefore follows that any diminution of a plaintiff's estate by the fraud of another amounts to an 'injury to property' within the meaning of the section. This becomes more apparent if we examine the actual facts of this case, as disclosed by the allegations of the complaint. Before the alleged fraud and deceit were practiced on the Ponsonbys they had a worldly estate consisting of real property in Minnesota of the value of \$5,500. After the fraud had been [62] perpetrated they had a worldly estate of \$1,000 cash and real property in California valued at \$500. The worldly estate of the Ponsonbys had been diminished or injured, to the extent of \$4,000. In such cases the injury consists in the wrongful diminution of the plaintiff's worldly estate."

Of course the word "property" is used in the attachment sections the same as that. That is not the case I had in mind, but I just picked up the first one I found in the short time I had.

The Court: What does that Section 711 say, again?

Mr. Neblett: "Conditions restraining alienation void. Conditions restrain alienation when repugnant to the interest created, are void."

The Court: You say that is under the section which is generally devoted to property—not to real property, but just property?

Mr. Neblett: That comes under Division 2, point 1, title 2, article 2. That is the way it is described in the Code. And it is the same Division and part and title that the section I read your Honor a while ago, Sections 654 and 657. It comes in that general classification. So far as our motion to dismiss is concerned, your Honor, this covers the point which we desired to make on our motion to dismiss.

The Court: All right.

Mr. Neblett: I assume that the Court—naturally in this argument I was very largely limited to the allegations of the complaint. I think I went out of it a little bit, which I think counsel will excuse me for doing because I don't think I went out any further than he did this morning. This will conclude our argument on the motion to dismiss.

Mr. Peckham: Your Honor, I would appreciate your indulgence while I go through the contentions which have been made by counsel in the order in which he brought them up. Although your summary of the contentions, I believe, would be a more neat way of doing it, probably, I have my notes in the order in which they came up.

First of all, counsel in the early part of his argu-

ment referred to the sections of the National Reserve Act of 1948 as the policy of Congress which declared, reading the last sentence, "it is further the intent of the Congress that such government-owned plants and such reserve shall not exceed in number or kind the minimum requirements for immediate use in time of national emergency, and that any such items, which shall be surplus to such requirements shall be disposed of as judiciously as possible." He stressed the minimum requirements aspect and related to your Honor that the plan there is not one that now can be used.

I don't think that counsel can advocate that position. [64] The Act itself sets up the Secretary of Defense to make that determination. It is a determination that will be within the Department of Defense to make. Again, I don't think it would be a proper matter to take evidence on, and I don't think your Honor would want to sit and pass judgment on that matter in regard to whether or not this particular plant would be included in the National Reserve as that term is used in the Act.

The Court: Insofar as any motion to dismiss is concerned, I wouldn't consider it. Insofar as the motion for interlocutory injunction is concerned, it is a consideration to be weighed in determining whether there is going to be any reparable harm to the government in the event that I don't grant the interlocutory injunction, because all they are doing is selling off a lot of machines, tools and equipment which they of course can be required finally to put back there or pay damages for doing

so, and so forth. There is no statement that the damages wouldn't if this action, a simple breach of contract, wouldn't suffice so far as the government is concerned. The question whether or not this is a violation of a policy of the United States which has to do with a national emergency may weigh against the fact that apparently there is no irreparable damage shown except that violation, and Mr. Neblett is arguing that this wouldn't come within that policy by virtue of the fact that they haven't any [65] designation of that.

Mr. Peckham: Go into that point, your Honor——

The Court: On the motion to dismiss, the argument he makes at that point, in that respect, does not seem to be valid and on the motion for interlocutory injunction it does seem to have some bearing.

Mr. Peckham: If you Honor please, on showing on the application and the production of testimony insofar as the government and other evidence as we put on that the plant has been properly designated by the Munitions Board and that they were properly designated by the Secretary of Defense under the Act, and that these provisions are in the bill of sale within the meaning of the National Securities Clause as it is defined in the Act, then your Honor wouldn't expect the government to make a further showing that that determination was correct?

The Court: Oh, no.

Mr. Peckham: Yes.

The Court: That is another agency. I can't interfere with what they determine.

Mr. Peckham: Yes, that is what I had in mind, your Honor. Now, in regard to whether or not this plant has been properly designated counsel, when your Honor was questioning him, did state that the provisions known as the National Securities Clause were being imposed before the National [66] Industrial Reserve Act of 1948 was enacted. That is correct. They were imposed properly under authority given by Public Law 364, known as the National Securities Act of 1947, wherein Section 5A—

The Court: Where is that? Is that in USCA?

Mr. Peckham: 50 USC Appendix 1611 through 1646.

Mr. Neblett: That is the Surplus Property Act, I believe, you have given now, isn't it?

Mr. Peckham: This is the Act of August 5, 1947, Public Law 364, to authorize leases of real or personal property by the War and Navy Departments and for other purposes. I believe that—isn't that the National Securities Act of 1947? Well, let me read Section 5(a):

“Whenever in the opinion of the Secretary of War or Secretary of the Navy, as the case may be, the interests of national defense require assurance of continued availability for war production purposes, of the industrial capacity of shipyards, plants, and equipment which are surplus to the needs of their respective departments or of the Reconstruction Finance Corporation within the meaning of the Surplus Property Act of 1944, they are author-

ized to direct the imposition of such terms, conditions, restrictions, and reservations in the disposition of such property by the disposal agency under said Act as will in the opinion of the Secretary concerned be adequate to assure such continued availability.”

The Court: Now, you said that is Title 5, Sections 1611 to 1646?

Mr. Peckham: Your Honor, I am unfortunately looking at the Statutes at large and I am not sure which USC section that is.

The Court: Give me the volume you are reading from.

Mr. Peckham: 61 Statutes, US Statutes At Large, Volume 61, Part 1, 80th Congress, at pages 774 and 775.

I would also refer your Honor to the National Industrial Reserve Act and just hastily refer to Section 452, Title 50, which has been referred to by counsel.

Now, (a) of that section, “The term ‘National Industrial Reserve,’ as used in this chapter, means that excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a National Securities Clause, and that excess industrial property of the United States which not having been sold, leased or otherwise disposed of subject to a National Securities Clause, shall be transferred to the Federal Works Agency under Section 454 of this Title.” It is the first part I wanted to stress.

Further: “The term ‘National Securities Clause,’ as used herein, means those terms, conditions, re-

strictions, and reservations, heretofore formulated or as may be formulated under Section 453 (2) of this Title'' for certain restrictions and so forth. [68]

This Act of 1948 simply restated a practice which was already in effect, administratively put into effect, and then later included in the National Securities Act of 1947, then to be, as I said, placed in this Act.

Now, attached to the complaint is the designation of the Moore Dry Dock West Yard. It has also been included in the official report of the Munitions Board to Congress on two different occasions in the years 1949 and 1950. We don't rely—certainly not entirely—on the plant release of John Steelman that Mr. Neblett referred to, but to the letter of P. W. Timberlake to the Deputy Administrator of the War Assets Administration, which is Exhibit 2 of the complaint, which lists in the annexed pages to that matter many plants, one of which is Moore Dry Dock Company, Oakland, California—that is found on page 5 of the annexed list of plants— [69] Oakland, California, W. C.-70588, which is the east yard of that involved, and under these provisions the yard is an agency of the Department of Defense, one of the instrumentalities to which the Secretary of Defense operates. It is a proper agency and has been delegated the authority to make these designations by the Secretary of Defense, Forrestal, pursuant to that citation which I believe I gave your Honor earlier in the Federal Register.

The Court: I remember your mentioning that Federal Register. Which one is that?

Mr. Peckham: Let me see. Just a moment. Well, I can find that for your Honor.

The Court: We won't finish this case today.

Mr. Peckham: It is the Federal Register, October 7, 1948; Federal Register Document Number 48-7,134. I think I have a page citation here somewhere, too.

The Court: In that connection, I don't want to disconcert you in your argument, but one point was made by the other side that this subdivision 3 says that "no bill of sale or disposal of machine tools or other severable production equipment is to be made, the lot of which would materially reduce the capacity of the plant to produce the items for which it was designed."

He says that west side is really the whole plant, as a whole, not just the west side is only a part of it, and since the east side has been split up and the west side is taken off, [70] consequently, this contention cannot be applicable because the plant as a whole was a shipyard. Now, it isn't a shipyard, and doesn't have any ships and no ways or anything else so that this language is really meaningless or inapplicable.

Mr. Peckham: Well, your Honor, I believe that the west side, the west yard has been used for ship repairs. I conferred with representatives of the Bureau of Ships of the Navy, and the yard could still be used for that purpose in case of National Emergency. The west yard was a part of the yard

used for ship repairing or construction of new ships, and that it does have a value and purpose independent of the east yard.

Going to the question of financial responsibility as being a criteria to establish irreparable damage, we have discussed that and I don't see in that, in connection with counsel's contention that this property has neither been depreciated out, that it has no particular value since more than seven years—it so happens, your Honor, and we can establish this by evidence at the hearing, that the machinery and equipment that was conveyed to the Oakland Dock and Warehouse Company at the \$366,000.00 figure, that was a very low figure for the reason of these restrictions. If these restrictions had not been placed in the bill of sale, the Government could have realized many, many, many, many more dollars than they did realize; and the fact is that if the Oakland Dock and Warehouse Company is permitted to go on and sell this property at a large profit, it will [71] be because the restrictions and regulations are not enforced and they are allowed to take advantage of a profit which—of a situation which the Government never intended in the distribution of the surplus properties and disposal of surplus properties.

We can produce evidence to show one piece of machinery, the most recent one, was sold and delivered. The fair value was \$1500.00 and it was sold for \$7,000.00 by Moore Drydock Company. When you apply that kind of a situation to \$366,000.00 worth of personal property, valued at that low

figure because of these very restrictions, and permit defendant to sell that property, much of it very valuable and still difficult to procure, it will perhaps be enough realized to pay off the whole damage just from the amount realized on the sale of the personal property.

The Court: Well, suppose they did that and suppose no claim—and suppose your claim that it would constitute an element of damage to you which you could recover in a proper action, and perhaps in this action? It is an action for breach of contract. You could say you took that low figure because of this restriction and they violated the restriction; therefore, you lost the value of the restriction, which was the difference between what they sold the property for and what you sold it to them for. You see, we are still talking about injunctive relief, not on this motion to dismiss.

You see, there is a difference between two matters. For [72] instance, I might deny the motion to dismiss and still also deny the right for interlocutory injunction. I am not saying I am going to, I am just telling you there is a difference in those subjects we are talking about. One is a motion to dismiss and the other a motion for interlocutory injunction.

We haven't heard any evidence on that or anything.

Of course, the motion for interlocutory injunction involves, as one of the elements, whether or not there will be irreparable injury involved.

Another element is to try to balance the equities,

whether it would be more equitable and more convenient to deny the injunction or whether it would be more equitable and more convenient to grant the injunction.

There are two matters that go to the question of injunction.

But while we are on this subject, if this doesn't disconcert you, let's get back to these claims that go to the motion to dismiss. For instance, that restraint on alienation of these conditions.

Mr. Peckham: May I address myself to that, your Honor? I think that is a fundamental issue.

The Court: Yes.

Mr. Peckham: First of all, and before I get into the question of whether or not that whole section pertains to personal property, or to both personal and real property, we take the position that in the disposition of property where the [73] United States has been an owner and was the seller of that property, that nowhere—that no State law applies just because the property happened to be situated in California, and just because the purchaser of the property happened to be a resident of California.

It is, further, in the power of the Federal Government to dispose of and make all rules and regulations respecting the territory or other property belonging to the United States. That is found in Article 4, Section 3, of the Constitution, which is, of course, the Supreme Law of the Land.

In *United States against Jones* decided in this Circuit——

The Court: Is this in your brief?

Mr. Peckham: No, it isn't, your Honor.

In *United States versus Jones*, 176 Federal Second, 278, that was a case arising out of the surplus property administration. Property was sold with proper bill of sale, and the question arose as to whether the law of the State of Oregon applied and Judge Yankowitz, sitting on the Ninth Circuit, gave very little attention to that contention, and stated that where the Federal Government is disposing of property, it can put what conditions and restrictions and reservations on that sale that it desires by its regulations and laws, and that no State law—that any State law does not apply to such a transaction between the United States and individuals; that the United States, under this Constitutional provision, is able to set down [74] those rules.

One of the major cases, a Supreme Court case, *United States versus the County of Alleghany*, 322 U. S. 174, the Court held that the question as to the owner's title in the property vested under Government Contract is not determined by the law of the State where the property is located and said further,

“The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts to which the United States is exercising its Constitutional functions, their consequences on the rights and obligations of the

parties ,the titles or liens which they create or permit, all present questions of Federal Law not controlled by the law of any State.”

In this matter where the United States is the party which is transferring property, the Federal Law applies and the State Law does not. There are cases, and counsel cited one of them, which is that case of Los Angeles Railroad Company versus the United States where the Government is the transferee of the property, the property being conveyed to the Government. In those cases, it has been held the State Law does apply because the Government can only acquire as good a title as a person has who conveyed to it. [75]

However, when the Government is conveying the property, the State Law does not apply and the Federal Law applies as to that.

The Court: What is the Federal Law of restraint of alienation?

Mr. Peckham: I think it would depend on the Statute that is applicable to a particular situation. Here we have the National Security Act of 1947 and the National Industrial Reserve Act of 1948, and further, the surplus Property Act which named the administrator—which has a thoroughly blanket provision that the administrator can impose such conditions as necessary to carry out the intent of the Act and related acts pertaining to surplus property.

The Court: What I was wondering was whether or not some of those acts impose any restriction—whether some of those acts say they can impose any restrictions they want—the United States can. Sup-

pose there was an unknown principle of law prevailing all over the United States, in every State, and this is a general legal principle to the effect that you couldn't in any conveyance restrict, make a condition which restricted the alienation of property?

Suppose that was the general principle of equity and for real property or personal, would or would not the United States be bound by that?

In other words, you say that you are given the right to [76] impose those conditions and you have that right no matter what the general law is under subject?

Mr. Peckham: That is right. In other words, even though there was a general law to be applied, I would say where specific acts of Congress are made, that relate to the United States, that such acts, that those acts, of course, would apply in situations arising under that act, and certainly this is one of those situations.

Now, counsel has stated that there is no provision in the bill of sale that the Government can take over, and expressed the vagueness of the Ten Year so-called dormant stages. Section 6, for instance, of the bill of sale, which is annexed to the complaint, on page two; states:

“When, in the opinion of the appropriate Secretary, the vendee fails to comply with the oppositions described herein, the vendor shall have the right to take full possession of said machinery, machine tools and equipment and to

take such action as may be necessary to remedy the vendees' default."

It also provides for the activation in considerable detail and restricts the—sets time for notice of 120 days, during which time the vendee has to prepare the plant to be turned over by the Government, and also states it can only be taken over, well, a ten year period, but it does spell out those restrictions which have been placed in this bill of sale. [77]

In relation to the—this is coming back to the point your Honor asked about—in relation to the Code Sections it is clear injunction cannot be given to prevent breach of contract in the Federal Court but by the equity rules of the State Courts, and I would like to cite cases on that. *Mississippi Mills versus Cohen*, 150 U.S. 202; *Duffey versus Smith*, 237 U.S. 101; *Pussy and Jones versus Hensen*, 261 U.S. 491. Those were cases arising between individuals, between private parties wherein the Court speaks in essence that Federal law applies as far as the principles of equity are concerned, even though it might be different from——

The Court: Are the State and Federal laws different in that respect?

Mr. Peckham: Yes.

The Court: In other words, isn't it a general principle of law the act of breach of contract, that that is on the common law side of any court and that accordingly no injunction can be granted? As a matter of fact, your injunctive relief is really an

equitable relief and it springs basically from the old equitable principle that equity will interfere where one of the parties hasn't a plain, adequate and speedy remedy at law, and if you sued for damages, you are really suing on the law side. Just like, take the case of breach of contract, a person has two different remedies. A person has the remedy of breach or rescinding of contract and sues on the equity side for rescission or cancellation of the contract and incidental damages. Here [78] they make the point that this is an action for damages on the law side, and they refer under that rule that any property, Federal or State, that there is no right to injunctive relief.

Mr. Peckham: Your Honor, I would like to go on on that point. In fact, I think perhaps mentioning this action as an action for equitable relief because there has been a breach of contract, that is not actually present in the situation. Actually, it isn't breach of contract that forces the Government to come in and sue for equitable relief in itself. I am confusing two thoughts. It isn't that we have a right to damages that is here important. If it is just a question of the financial responsibility, we have a right to action for damages then the whole policy that underlies the National Security Clause would be unnecessary because originally surplus plants could have been disposed of at the restricted price and release the Government would have obtained, or now if this injunctive relief is not granted the Government will obtain in this action by suing for damages. They would have originally got what

the Government was entitled to for these plants without any restrictions if it were to be conveyed in that way.

The policy on the Act, the legislative policy which Congress set down, which has been carried out by the Secretary of Defense through the Munitions Board, is what is in jeopardy here. If it can be established that proper designation has been made and this is part of the National Reserve, the [79] dismantling, the cannibalization of this plant will certainly be a violation of the legislative policy laid down. I think in view of the policy laid down by Congress these surplus plants are to be held and not dismantled. I mean to permit it to go on without injunctive relief certainly will cause the Government irreparable damage because the plant won't be ready in case of a national emergency.

Regarding the rights of the Government to have an injunction to enforce the rights, property rights, and also the laws in this situation, I would call attention to U.S. versus City and County of San Francisco, 310 U.S. page 16. Your Honor may recall that case as one that arose out of the Raker Act where the P.G.&E. was being given the power to resell to consumers whereas the Raker Act—in that case the point came up that it wasn't a proper case. It was a breach of contract, was not a proper case for injunction to have been issued. And Justice Black in that case didn't accept that condition. He said the United States has a perfect right to enforce its laws and a perfect right in such a situation as that, which I think is analogous to this case.

Counsel also stated that the fact that the general administration has released the Federal mortgage from time to time could be considered a release of its property to be disposed of as the defendant saw fit. We contend, of course, that the conditions of the chattel mortgage that release of the [80] chattel mortgage were restricted to the—that is, that the release was restricted certainly to a release of the chattel mortgage, not to a release of the National Security Clause. It was certainly, however, even though you are required to keep this property, to have a chattel mortgage release for you wouldn't have to pay interest. The fact that the chattel mortgage is released, there is nothing in the provision of the chattel mortgage to provide a return to the National Security Clause or—I think the chattel mortgage release is simply a release of the property to release that particular equipment. In regard to the declaration by the mortgage, Paragraph 9 in the chattel mortgage, that the mortgagor is the sole owner of the property, that would seem to be a self-serving declaration found there on the part of the mortgagor. The mortgagor——

The Court: Well, that doesn't impress me very much, anyway.

Mr. Peckham: Yes. It was standard.

The Court: It has reached 4:00 o'clock, Mr. Peckham.

Mr. R. L. Miller: Your Honor, may I, before we adjourn, request permission to address the Court in this case? My name is Miller, R. L. Miller. I am attorney for the Moore Dry Dock Company. The

Moore Dry Dock Company is not a party in this case, but they are indirectly and may be directly affected by it. I may not be able to be here at the continuance of this matter, and I would like to say this: [81]

First, during the course of the hearing today there has been a good deal of reference to the Moore Dry Dock Company west yard and the Moore Dry Dock Company east yard. I wanted to be sure that there is no misunderstanding and Moore Dry Dock Company, a private corporation, to have owned that west yard. That just happened to be a name applied to it because during the war they operated it for the Government. That west yard belongs to the United States Government. The Moore Dry Dock Company's east yard was never involved in this because that yard was owned before the war, during the war and now by the Moore Dry Dock Company; and when you speak of the east part or east yard here, they have reference to the east half of the west yard and not Moore's east yard. I think for the purpose of the record that should appear.

Moore Dry Dock Company has for a number of months been buying equipment from the Oakland Dock and Warehouse Company, some of the equipment referred to in this hearing, and that equipment was advertised for sale publicly, Moore came and inspected it and found pieces of machinery he needed in their yard; he bought it, paid cash for it, took it to their east yard, their own yard, installed it there and used it. I wanted to be sure that it is understood here that my client, Moore, bought that

equipment with no knowledge, actual or constructive, of any restriction upon its title. They came and purchased it and the chattel mortgage had no reference whatsoever to any [82] National Security Clause. They knew that there was a principals' release clause in that chattel mortgage. The items they bought were released from the chattel mortgage by principals' releases signed by a representative of the United States Government and placed on record.

The Court: Was there any release against Moore Dry Dock?

Mr. Miller: No, but I want to be sure no order is entered that would in any way cast any cloud of doubt upon the title to that property.

The Court: That you bought?

Mr. Miller: The property that they bought. They are not interested here in the injunction so long as it doesn't affect the property already transferred. That concludes my statement. We are not parties to this cause, but I wanted that entered.

The Court: You are certainly not interested in the application for interlocutory decree?

Mr. Miller: Not at all.

The Court: If I were to protect my rights, if this case goes to trial on that permanent injunction, if you had filed an Intervention so that what you have already bought without knowledge, bona fide purchase for value here, that were protected——

Mr. Miller: Certainly. That is the reason for my appearance here today. I don't think there is any need of staying longer on this motion to dismiss

because I don't see [83] where we can be affected at all.

The Court: In any event, as I said, I have been here all day long so I will have to continue it. Monday we can't possibly take it up because we have the law and motion, Counsel. I can go ahead with it on Tuesday, I think.

Mr. Neblett: That is agreeable to us, your Honor, the defendant.

The Court: And by that time I can listen to further arguments on the motion to dismiss and then if I decide against the motion we can proceed to present whatever evidence is necessary to be put in on the preliminary injunction matter, in other words, on the application for temporary injunction.

Mr. Peckham: Well, your Honor, would your Honor desire further written brief and points and authorities submitted? Those submitted by the Plaintiff I know were hastily drawn because of the immediate necessity to take action, and if your Honor feels that it would be desirable to present written argument, and so that Counsel also could answer some of the contentions we have hit upon today, I would be glad to do that. I know that this perhaps becomes a trite saying around here, but I do know the Government is quite concerned about this case and I would feel I were remiss in my duty if I didn't furnish everything the Court felt necessary.

The Court: I have taken down the citations and taken down the points both sides have made, and I will look them up [84] in the meantime and may be

in a position to rule on the motion to dismiss on Tuesday, then you may proceed with your injunctive relief if I should decide the motion to dismiss against the defendant.

Mr. Neblett: If your Honor please, the defendant is getting a daily transcript and if the Court would like to have a copy of the transcript of the citations and arguments made today we will get one available for you.

The Court: I wonder if you could have that available? I would like one Monday morning.

Mr. Neblett: The Reporter promised to furnish mine tomorrow afternoon, and if the Court—I suppose the Reporter would send one to the Court wherever the Court is tomorrow afternoon—or Monday morning, did you say?

The Court: Monday morning, yes.

Mr. Neblett: Mr. Reporter, you can have the copy for the Court by Monday morning?

The Reporter: Surely.

The Court: Are you getting a copy also?

Mr. Peckham: I think I had better, yes.

The Court: I don't think it is necessary for you to submit any authorities that you haven't already submitted unless if you feel you want to you can give me a written memorandum and set them down and send Mr. Neblett a copy.

Mr. Peckham: Certainly.

The Court: Where are you now?

Mr. Neblett: At the Palace Hotel.

The Court: Well, we will continue this to Tuesday morning at 10:30.

The Clerk: All witnesses subpoenaed in this case are requested to return to this courtroom at 10:30 a.m. Tuesday morning, June 20th.

Mr. Peckham: I was just going to mention the temporary restraining order expired at noon today, and I wonder if——

The Court: I will make an order continuing it in effect. It will be continued in effect pending this hearing. Court will adjourn. [86]

Tuesday, June 20, 1950, 11:00 o'Clock, A.M.

The Clerk: U. S. versus Oakland Dock and Warehouse Company, Order to show Cause, further hearing.

The Court: I might say this to you, gentlemen, that I haven't had time to digest all these authorities and I would like to just hold the motion to dismiss in abeyance and have you proceed on the—if you have any proof to offer in connection with the application for temporary injunction, or against it, why, offer that now. You have pretty thoroughly argued the situation already, so if you want anything to add to the record, just do that, and I will take it under advisement.

Mr. Neblett: There are a few authorities I would like to advance to the Court in respect to those that Mr. Peckham, that the Counsel for the Government entered the other day against the motion for dismissal, if that will be satisfactory to the Court.

The Court: That will be all right. You can proceed to do that.

Mr. Neblett: Very well, your Honor. Your

Honor, I don't intend to read from all those books; I just have them handy in case I need them.

The first authority to which I wish to reply is that cited for Counsel for the Government, the United States against Jones, 176 Federal 2d, page 278. That is a case in which Judge Yankwich, sitting on the Circuit Court of Appeals, rendered an opinion relating to certain properties sold by War Assets Administration. The Government brought a suit in that case to set aside a sale made by War Assets Administration upon the ground of fraud. The demurrer was sustained to the complaint, or motion to dismiss was made, I have forgotten which. The United States appealed it to the Circuit Court of Appeals and the lower court's decision was affirmed.

There is some language in there, general language, relating to sales by the Government which we have no quarrel with. I think that case is in favor of the defendant here. Certainly I don't believe it is in point, because the Court found the lower court, made in its opinion, examined by the Circuit Court of Appeals, said neither fraud nor subtlety on the part of the agents of the War Assets Administration was charged; and then went on, was that a lack of legal authority to make the conveyance.

The only point involved was the question of whether there was authority to make the legal—legal authority to make the conveyance. No question about that. That is given in Section 1652

USCA, the old War Assets, the old Surplus Property Act.

I can't see, your Honor, where that case is at all involved.

Now, the next case upon which Counsel relied was United States against the City and County of San Francisco, 310 U. S. [88] at page 16.

The Court: That is under the Raker Act.

Mr. Neblett: That is it, your Honor. This case—I read it rather hurriedly, but in general what was involved there was that under the Raker Act the Hetch Hetchy dam was built in the Forest Reserve, and the Act provided that power could not be sold to individuals, power was sold by the Hetch Hetchy Dam Authority to the Spring Valley Water Company, and it in turn sold the power to the citizens of San Francisco. That case arose on a situation entirely different from ours. The Act provides, Section 6: "That the grantee," the City, I think there was a special Act, I'm not sure about that—

"That the grantee is prohibited from ever selling or letting to any individual except a municipality or municipal water district or ir-water or electric energy sold or given to it or rigation district the right to sell or sublet the him by the grantee." That was in the deed.

"Provided that the rights hereby granted shall not be sold, assigned or transferred to any private person, corporation or association."

And in the case of any attempt to sell, assign, transfer or convey this grant shall revert to the Government of the United States.

There is no reverter in the bill of sale or in the deed, [89] for that matter. That involves an entirely different situation upon a deed or bill of sale. There is a reverter if there is a condition broken; no reverter here. If a condition were broken and it were valid, then nothing could happen because there is nowhere for the property to go. It has to stay in the vendee.

And the question of designation, I mean of delegation of authority, I think those cases which we have already cited cover that very thoroughly, but I do not believe I cited to the Court in argument, in fact I know I did not, the two cases of Morgan against the United States. The first of those cases is reported at 298 U. S. page 468; the second of those cases is reported in 304 U. S. at page 1.

It is very probable that the Court remembers those cases. There it was a question of whether or not the Secretary of Agriculture could delegate to his subordinates the right to fix rates for the Kansas City stock yards. They are known as the Kansas City Stock Yard cases. It was held in those cases that the Secretary of the Interior could not delegate that right.

Again repeating myself, that if this authority had been delegated to a deputy of the Secretary of Defense to establish whether or not this property was a part of the Industrial Reserve and to fix the Security Clause for disposition, and at the same time to designate it for disposal subject to that [90] Security Clause, if the deputy had done that, that

would probably have been good, or certainly under the California law it would have been good.

The next case or question of delegation which I think is important is Cudahy Packing Company of Louisiana against Thomas W. Holland, administrator of the Wage and Hour Division of the United States Department of Labor. That case is reported at 315 U. S. page 357. It was held in that case—I am reading from the syllabus now:

“The power of the Administrator, under the Fair Labor Standards Act to delegate his power to sign and issue subpoenas is not to be inferred, either from the extensive nature of his duties, or from the fact that, under Section 11 of the Act, he is empowered, through designated representatives, to gather data and make investigations authorized by the Act.”

“Unlimited authority of an administrative officer to delegate to subordinates his power to issue subpoenas is not to be lightly inferred where, under the applicable statute, this power is in terms granted only to him.” “The fact that individual members of the Federal Trade Commission are authorized to sign and issue subpoenas does not empower the Administrator, under the provision of the Fair Labor Standards Act giving him all the powers with respect to subpoenas that are conferred upon the [91] Federal Trades Commission, to delegate to regional directors the authority to sign and issue subpoenas, since the Administrator

himself, not such directors, stands in the position of the individual commissioners."

So we say that this authority could not be delegated.

The Court: Of course, there was no delegation under the Act of July 2, 1948, was there?

Mr. Neblett: Yes, your Honor, the delegation came July 3, 1948.

The Court: There was no designation, I should say, of this property.

Mr. Neblett: No sir, there has never been.

The Court: Under that Act.

Mr. Neblett: That is correct.

The Court: The only point here, was there any designation under the previous Act of 1947 and the others Mr. Peckham referred to?

Mr. Neblett: The previous Act, 364, I don't have the Act before me, but my recollection is that under that Act there was no provision in that for delegation. I know of no provision imposing the power specifically upon the Secretary of Defense. I don't have that with me and I don't know where it is reported in the books, but if your Honor please, we make the point which I feel very confident of that under—that the purposes of this Act of 1948, which became effective July 2, 1948, was to [92] place the entire Industrial Reserve under the Secretary of Defense and totally away from the three departments under him, namely, the Army, Navy and Air.

The terms of the Act are very specific on that point and while this Act does not in expressed terms

repeal 364 of the 80th Congress, First Session of the 80th Congress, it does establish the Industrial Reserve as a new thing. Everything that went before that is unimportant. This Act became effective, the Industrial Reserve Act of 1948, July 2, 1948, and this property was purchased eleven months later from the Government.

The Court: I understand that.

Mr. Neblett: Now, here is the thing that I want to make as clear as I possibly can about the bill of sale. I will have to look in my files to find the reference, I can't find it there.

If your Honor please, if the Court would refer to the bill of sale in the Complaint at this time I think I can shorten my argument on this. The bill of sale is attached to the Complaint as Exhibit 1.

The Court: I have it.

Mr. Neblett: Now, your Honor will note that the bill of sale says that: "Said chattels were duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and W.A.A. Regulation No. 1 as amended." [93]

Executive Order No. 9689 has to do solely with surplus property, nothing to do with the Industrial Reserve. And the War Assets Regulation No. 1, of course, has the same thing. Up in the body of the—up in the beginning of the bill of sale, "The United States of America, acting by and through War Assets Administration under and pursuant to Reorganization Plan of 1947 and the powers and authority contained in the provision of the Surplus

Property Act of 1944," does convey, and so forth.

This Security Clause and this bill of sale was not the Security Clause that was in force at that time, showing this property had never been designated for disposal.

We go back now to the Public Law 883. It says: "To effectuate the policy set forth in Section 2 of this Act the Secretary of Defense is hereby authorized and directed to

"(1) determine which excess industrial properties should become a part of the Industrial Reserve under the provisions of this Act; and

"(4) designate what excess industrial property should be disposed of subject to the provisions of the National Security Clause."

We go back to the report which has been read from here by Counsel for the Government. The report of April 1, 1949, to Congress. We find the security clause, which was supposed to go in this bill of sale, if the property were conveyed [94] according to Public Law 883 and had been so designated by the Secretary of Defense to be disposed of subject to Public Law 883. This security clause became a security clause April 1, 1949; this property was conveyed or sold to the Oakland Dock and Warehouse Company and the bill of sale is dated June 1, 1949, three months—two months later. We are bound by the terms of this deed—this bill of sale, I should say, that is definitely decided in Los Angeles and

Salt Lake Railway Company against the United States, Circuit Court of Appeals, 9th Circuit, 140 Federal 2d 436.

There it was definitely decided in the case brought against the Government of the United States that we are limited to the four corners of the deed and that in effect the rule is the same with regard to the United States as it is with respect to a private person. And that is definitely held when the transaction is an ordinary commercial transaction in some of the cases I have cited on the motion to dismiss, but I come to that a little later.

Your Honor please, to show you just that this security clause is not as ever designated by the Act—let me refer the Court to page 275 of the Report to Congress, by the Munitions Board acting by and on behalf of the Secretary of Defense so stated in the Letter to the Vice-president, President of the Senate. This is dated April 1, 1949, and it says on page 275:

“This part deals with the formulation of the National [95] “Security Clause, and procedures for modification of its provisions for purposes of specific transactions.”

Now, this is a specific commercial transaction in which the Government was engaged in selling us property, to the Oakland Dock and Warehouse Company.

“The National Security Clause is hereby formulated as follows:”

Now, I assume that this is what the Secretary of Defense formulated, because in this letter of March 17, 1949, transmitting this report to the President of the Senate, at the end of that report it is said:

“This report is submitted on behalf of the Munitions Board and on behalf and by the direction of the Secretary of Defense.”

Now, that is a proper designation signed by the Chairman of the Munitions Board. There is nothing else in this thing signed by the Chairman of the Munitions Board.

I hope your Honor will not consider lightly when I say everything that goes before July 2, 1948, is of no force and effect with respect to this property. 1949, I should say—the wrong dates.

“The National Security Clause shall consist of those provisions.”

and so forth. And it is very long and quite different from the one we have in the bill of sale. It is entirely different. [96] Now, it goes on and then says, the Security Clause comes to the point where deeds of real estate, including rights in real property shall be in a certain form. Then it comes to:

“Bills of sale of personal property. (1) Reference to Public Law 883. A property hereby transferred constitutes a part of the National Industrial Reserve under Public Law 883 (80th Congress) and has been designated for disposal subject to the provisions of the National Security Clause pursuant to Section Four (4) thereof. This and the following pro-

visions constitute the National Security Clause of this bill of sale.”

Now, this deed doesn't make any—bill of sale doesn't say anything of the kind. It said:

“Said chattels were duly declared surplus”—which is, of course true—“and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and W.A.A. Regulation No. 1 as amended.”

The Government had a right to convey the property to the Oakland Dock and Warehouse Company on terms different from what is required here as property disposed of subject to the National Security Clause, because this document says, in the opening paragraph.

Let us go on: “The bill of sale shall be signed by both parties and shall include the additional provisions set forth below.” [97]

It is not signed by both parties; it is only signed by one. Why did the Government want it signed? Because the Government wanted it signed so that it would become a contract outside of any consideration of whether or not it was—whether or not the rule in 711 of the Civil Code applied.

Now, another requirement: “It shall make specific reference to the agreement of sale or letter of intent.” It doesn't do it. We had a letter of intention in this case. It isn't alleged in the Complaint, but we did have one and I will have it for introduction if it ever becomes important. That is

the reference to the letter of intent or agreement of sale. The only reference is that they were duly declared surplus and disposed of, to be disposed of by the War Assets Administration. The rest of the provisions in the formal security clause provided in 1949, before we bought this property—there are a great number of them here which can be picked out, but these are absolute flat requirements and none of them are in the bill of sale.

Now, the great question of public policy which we have brought up so much—I say “we.” I mean Counsel for the Government has adverted to that quite often. The public policy as established by Public Law 883 hasn’t been applied to this property at all. But here is the reason why this deed, this bill of sale was made in the form in which it was made. I now refer to the Report as of April 1, 1950. Your Honor will [98] recall Section 12, Public Law 883 required the Secretary of Defense to make report each year to Congress. This is the one of April 1, 1950. As of April first. It is dated March 14. And in the letter transmitting this report to the President of the Senate—there is one, also, transmitting another copy to the Speaker of the House. This report is—well, I will read the letter:

“I am transmitting herewith second annual report to Congress of the National Industrial Reserve Committee, Section 12 of the National Industrial Reserve Act of 1948, Public Law 883 of Congress. This report was supported by the Munitions Board, which changed it a little bit. The Chairman of the Board, Munitions Board,

on behalf of and by direction of the Secretary of Defense. Sincerely yours, Hubert E. Howard, Chairman."

This shows that the Government was very anxious to get rid of this shipyard. What I am going to show to your Honor now, it had a lemon on its hands. It was rusting away over there and had already depreciated beyond the point of even seven years. It was actually nine years old. No, just seven years old when the Company bought it. In this report of the shipyard facilities there it is obvious that the defendant wouldn't buy it on these binding terms. It is obvious from the deed that—it is obvious that the defendant from the allegations of the Complaint, in the bill of sale, that [99] the defendant wouldn't take it on those terms. Therefore, the deed was re-formed and put in—the bill of sale was re-formed. I keep referring to deed. The deed is not involved yet. I hope your Honor will pardon me for the slip of the tongue.

The bill of sale was written and the Government is responsible for it and we are bound under it under that Los Angeles Salt Lake Railroad Company case. It is a valid clause, and so is the Government.

This tells the story why the Government was willing to sell this shipyard on a different basis than the security clause, which is rather tough. On page 77 of this Report of 1950 the Secretary of Defense has this to say about shipyards:

"A. Types of Shipyards. The facilities as-

signed this Committee range from independent manufacturing plants for marine engine or marine equipment through facilities integrated with previously established manufacturers to complete shipyards with building ways, outfitting docks, and the necessary shop buildings for new work or repairs.

“B. Manufacturing Plants. With a few exceptions, the manufacturing plants have been served under some form of the Security Clause and are therefore available to the Government in the event of an emergency, with comparatively little delay.”

Your Honor will notice that word there, “some form of the Security Clause.” It means that they may vary in specific [100] instances.

“C. Shipyards. The shipyards, or ship building and ship repair facilities, present a different problem. In view of the fact that there is insufficient ship building and ship repair activity at present to support long established shipyards, together with their skilled personnel who would be essential in any future emergency, it is obviously impossible to maintain the reserve ship yards as active ship building facilities. Conversion to other peace time use is difficult in that the properties generally involve a considerable amount of real estate, a large number of buildings, many of a temporary nature and ill adapted to industrial use, and ship building ways which can serve no

other purpose but are extremely difficult to maintain.”

Interpolating, we know—I mean it is common knowledge that the big Naval yards at Hunters Point and Mare Island are doing very little business. It is common knowledge that, how many they threw off there the other day I don’t know, but there are hundreds of them tied up at Swan Bay, ships of the type built in this yard. Here it says it is obviously impossible “to maintain the reserve ship yards as active ship building facilities, etc.”

“D. Retention of Ship Yard Sites. Recognizing these problems in connection with shipyards, most of the [101] plants have been cannibalized of production equipment, and the land, docks and more adaptable buildings have been leased to a number of tenants for a wide variety of peace time activities. This at least provides for a certain degree of maintenance and some offset of expense to the Government. A suitable modification of the Security Clause provides for the recapture of the sites in the event of an emergency.”

Your Honor please, may I impress on the Court the word “site”? I am not interested in the machinery. The Government isn’t interested in it and the Secretary of Defense and the Munitions Board are not at all interested in the machinery. They are interested only in the site, and there is no argument here but that the Government has now a valid Security Clause for the recapture of the site in the

event of an emergency. They have no interest in this obsolete machinery. That is the reason the bill of sale was written as it is, and this suitable modification of the Security Clause was already on the books April 1, 1949, when the Government sold this property to Oakland Dock and Warehouse Company in 1949.

“Unwarranted expense would be involved in the idle maintenance of ship yards, particularly in view of the fact that practically all were specifically designed for the production of definite types of ships required in World War II. Assuming that there might be quite different requirements in a future emergency, considerable alteration in both layout and facilities may be required,”

end of quote. We are coming back to that.

He is saying “unwarranted expense.” Unwarranted expense on whom? On the purchaser of this property to try to maintain them as shipyards and try to keep that obsolete machinery there so that the Government assumed, the Secretary of Defense assumes there might be, that different requirements for ships that will be built in the future.

Finally, concluding this subject and quoting again:

“With a suitable waterfront site available, at least one of the major delays in establishing a ship building facility will be eliminated by retention of title or lease, regardless of the disposition of buildings and equipment.”

That is the public policy of the United States as reported by Public Law 883, as administered by the Secretary of Defense, including the Munitions Boards. That is the reason I say this suit—this suit was instituted by the Navy. The Navy has no business in court. It has to be done by the Secretary of Defense. The Navy has no business bringing this suit.

Now, if your Honor please, we come down to this. What do we have? We have here under the ordinary law wherein, Paragraph 3, covenant against resale is invalid. If it is invalid, there is no case here of any kind. I am not going [103] over the California cases any more on that because your Honor has been familiar with them for as many years as I have, and I think that is probably stretching it a little bit, but—

I want now to direct your Honor's attention to a case here of the Supreme Court, what it says about covenants against resale and restrictions of alienation of personal property. This answers that question that your Honor brought up the other day wherein these things apply to personal property.

The opinion in this case was written by Mr. Justice Charles Hughes, the name of the case is: Dr. Miles Medical Company against John D. Park and Sons Company, 220 U. S. 373; 55 Law Edition 502. That is a very long case, but I will quote—I will come to one of the points which answers every question that we have been asked relating to personal property and the restraints on its alienation and other conditions.

Before I read it I will refer the Court to 17 Corpus Juris Secundum, page 635, Section 253.

Coming back to this case, the second point made in this case was restrictions, and so forth, on sale of personal property:

“We come then to the second question,—whether the Complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture. [104]

“The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety——”

There are two points involved. The only two points that are involved are what I am now trying to present to the Court——

“The propriety of the complaint is thought to be derived from the liberty of the producer.

“But because the manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose on purchasers every sort of restriction. Thus, general restraint upon alienation is ordinarily invalid. ‘The right of alienation is one of the essential incidents of a right of general property in moveables, and restraints upon alienations have been generally regarded as obnoxious to public policy, which is best served by great

freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void.' 'If a man' says Lord Coke in 2 Coke on Littleton, Section 360, 'be possessed of a horse or of any other chattel, real or personal, and give or sell his whole interest or [105] property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest or property is out of him, so as he has no possibility of a reverter; and it is against the trade and traffic and bargaining and contracting between man and man.'

"Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchaser, fix prices for future sales,"

and so on.

That one answers the point exactly. And, your Honor, this closes my argument.

The Court: It is 12:00 o'clock now. We will take a recess until 2:15.

(Thereupon this cause was adjourned until the hour of 2:15 p.m.) [106]

Tuesday, June 20, 1950, 2:20 o'Clock P.M.

The Clerk: United States versus Oakland Dock and Warehouse Company. Further hearing on order to show cause.

Mr. Peckham: Ready for the Plaintiff.

Mr. Neblett: Ready for the Defendant.

The Court: Is there any evidence now to be introduced on this motion for preliminary injunction?

Mr. Peckham: Yes, your Honor. We propose to introduce evidence through the calling of several witnesses, propose to call Mr. Deede, executive of the War Assets Administration, Admiral Klein of the United States Navy and Mr. Bulotti and Mr. Wille, Moore Dry Dock Company, to establish several points I think are necessary for us to establish in this hearing.

The Court: I understand it is admitted now that the defendants have sold and are planning to sell this material?

Mr. Peckham: That is correct.

The Court: What other point is essential—like to hear from Mr. Bulotti—but on the other hand I don't need——

Mr. Peckham: Your Honor, we felt in view of the discussion last Thursday or Friday that it was essential that we establish the—that we introduce evidence to establish the irreparable damage that would occur to the Government in the event that the preliminary injunction was not granted. We desire to show that there are items of machinery and machine tools there that [107] are now difficult

to procure and would be particularly difficult to procure in the event of a national emergency, and we also wanted to establish that this plant had been designated by the Munitions Board at the recommendation of the Navy, as part of an overall plan, that this plant has a particular purpose in this overall plan.

The Court: Go ahead, then.

Mr. Peckham: Mr. Deede.

RALPH G. DEEDE

called as a witness on behalf of the Government being first duly sworn, testified as follows:

The Clerk: Will you state your name to the Court, please?

A. Ralph G. Deede.

Direct Examination

By Mr. Peckham:

Q. Mr. Deede, what is your address?

A. My business address, 1000 Geary Street; home address is 2868 California Street, San Francisco.

Q. You are an official of the War Assets Administration, now the General Services Administration?

A. That is correct.

Q. And what is your position there, Mr. Deede?

A. I am the Director of Property Management and Disposals.

Q. And how long have you been acting in that capacity? A. Since April of 1949.

Q. And did you, in that capacity, have anything

(Testimony of Ralph G. Deede.)

to do with the [108] sale of the west yard to the Oakland Company? A. Yes, I did.

Q. Now, Mr. Deede, are you familiar with the transaction in this case? A. Yes.

Q. And you have refreshed your memory from a review of the file of the sale to the Oakland—

A. Yes, sir.

Q. —dry dock yard by the War Assets Administration? A. That is correct.

Q. Now, Mr. Deede, did you receive any instructions from Washington, D. C., the central office of War Assets Administration, prior to the sale of this yard that this plant was to be disposed of subject to the National Security Clause?

Mr. Neblett: Your Honor please, that is objected to on the ground it is not the best evidence.

The Court: I think the objection is well taken. Any correspondence?

Q. (By Mr. Peckham): Do you have with you the file, Mr. Deede? A. Yes, sir.

Q. Now, referring to the official records of the War Assets Administration, Regional Office?

A. That's correct. This is rather a voluminous file, rather hard to find some of these documents.

Q. And your records are kept in the course of the official [109] business of the Government of the United States, are they not?

A. That is correct.

Q. And those records are under your custodianship as the Director of the Surplus Property Disposal Unit of the War Assets Administration?

(Testimony of Ralph G. Deede.)

A. I have here a teletype from Washington. It is dated 5/7/48.

The Court: Show it to Counsel.

Q. (By Mr. Peckham): And would you read the telegram?

Mr. Neblett: Your Honor please, we object to the telegram in evidence and object to the witness reading it in evidence. As I understand the law now we are limited to what is in the deed or in the bill of sale and that all this evidence is irrelevant and incompetent and tends to contradict the written instrument.

The Court: It may be, but I will admit it in evidence. May be bearing on the terms of the written instrument, but I am interested in knowing what the circumstances were in this situation.

Mr. Neblett: Your Honor, may I add to the objection that the telegram appears to have been dated May 7, 1948, prior to the time of passage of Public Law 883.

The Court: Yes.

A. This is addressed to the Regional Director, War Assets Administration, San Francisco, and starts as follows:

“Refer to the Administrator’s wire of April 8, 1948, [110] relative to freeze on industrial real property. Munitions Board has requested imposition of National Security Clause on the following additional Industrial facilities in your area.”

(Testimony of Ralph G. Deede.)

And then a list of several facilities, one of which is Moore Dry Dock Company, Oakland, California, MC70588.

“The facilities listed above, together with those facilities shown in the list April 9, 1948, copies of which were sent to you, shall be sold or leased in accordance with applicable National Security restrictions. By direction of the Administrator those facilities not so listed may be offered without restrictions. Those plants on which counter proposals were outstanding on April 8 and were amended to include National Security Clause restrictions and those plants which were awarded between April 8 and today subject to National Security Clause restrictions may be sold or leased without restrictions if not included in the April 9th or the above list. However, in event purchaser or lessee has interposed no objections to National Security Clause provisions such restriction should be included in order to increase industrial potential in event of a National Emergency.

“All cannibalization authorizations applicable to plants listed above are hereby rescinded and inventory of related personal property will be returned to real [111] property accounting. Instructions relative to Jannat and sales of unrelated personal property will be issued by office of general disposal. Signed O.R.P.D.

(Testimony of Ralph G. Deede.)

Office of Real Property Disposal, War Assets Administration, Washington." [111-A]

Q. (By Mr. Peckham): Have you received any further communications prior to the sale of the establishment known as the west yard of the Oakland company from your central office in Washington?

A. Yes, we had considerable correspondence on this yard. And the reason for it was that our office, locally, had made recommendations on several occasions for the western office to appear before the Munitions Board and consult with the Navy to modify the National Security Clause on this plant, and our reasons for doing so were because in our opinion it affected the value tremendously. Of course, we were primarily concerned with getting the most money for the plant and we didn't take into consideration the necessity by the armed forces as to why the plant should be in the Reserve. We were trying to get all the money for it at the time we sold it, and each time our Washington office advised us that the Munitions Board would not agree to the modification of the National Security Clause on this plant, so as a result we offered it subject to the National Security Clause and eventually sold it in that manner.

Q. As an incident to the sale of this plant, Mr. Deede, advertisements were circulated, were they not?

A. Yes, sir.

Q. And notification goes out to potential bidders, does it?

(Testimony of Ralph G. Deede.)

A. That is right. We prepared invitations to bid.

Q. And in your invitation to bid, was there any mention of the [112] National Security Clause?

A. Yes, sir.

Q. And did you take—I believe you have already testified you took part in the negotiations with officers of the Oakland Company?

A. That is correct.

Q. During those negotiations, whom did you confer with regarding the sale to the Oakland?

A. Well, initially it was with Mr. Van Dusen and Mr. Henry Arnold.

Q. Can you identify those two men?

A. Yes.

Q. Who are they?

A. They were officers of the Oakland Dock and Warehouse Company.

Q. And during the course of those conferences, was there any discussion of the sale and delivery of the property being subject to the National Security Clause? A. Yes.

Q. Now, do you have in your file, Mr. Deede, a Letter of Intent?

A. Yes, sir. Copy of the letter. The original went to the Oakland Dock and Warehouse Company, of course.

Mr. Neblett: I might make a statement. I would object to the admission of this letter because that is not the Letter [113] of Intent. I might say I have sat in on all these negotiations and this Letter

(Testimony of Ralph G. Deede.)

of Intent was supposed to have been signed, but never was. And that Letter of Intent was dated April 27. I have a copy of it which I will make available.

A. I have that one, too. That is in your file?

Mr. Neblett: I think on the record I might say——

A. It is May 27th.

The Court: Was that this year?

A. No, last year; 1949.

Mr. Peckham: I think, your Honor, this might be expeditiously introduced. Counsel informs me he is going to stipulate that that is the signature of Jules—is that Jules?

Mr. Neblett: J. Agostini, Jr., and A. Hanford Morgan. They were President and Secretary of Oakland Dock and Warehouse Company. I am also prepared to stipulate that is the signature of Robert W. Bradford, Regional Director for War Assets.

Mr. Peckham: At this time, Your Honor, I would like to ask the witness to explain the purpose of the Letter of Intent.

The Court: Well, the Letter of Intent may be admitted in evidence on the motion, and just tell me what it says, without reading it.

A. The Letter of Intent, your Honor, was a document which we prepared and had the purchasers of a facility execute, as well as some official in authority at the War Assets, to spell out the terms and conditions of the sale and use it as a document [114] of closing pending the delivery of a deed

(Testimony of Ralph G. Deede.)

so that we could put the purchaser in immediate possession under all the terms and conditions as the plant was sold.

Q. (By Mr. Peckham): Among the terms or conditions, Mr. Deede, was the statement that the property, both real and personal, was sold subject to the National Security Clause?

A. That is right.

Q. Mr. Deede, do you have any personal knowledge as to the original value of the west yard, the western portion of the west yard that was sold to the Oakland Dock and Warehouse Company?

A. Well, our appraisal, which was made by—

Mr. Neblett: Just a moment, if your Honor please. I understand that this is a qualification question. I want to object to his testimony when he gets to the point of establishing the value.

The Court: He is not qualified to state that yet.

A. I have a signed document by the chief of our Appraisal Division with me that established the value of the plant.

The Court: I don't know whether that is admissible, but I will hear it anyway.

Q. (By Mr. Peckham): Will you produce that?

The Court: You mean the value of the personal property?

A. Personal and real, the entire facility.

The Court: We are not interested in the real property.

Mr. Neblett: If your Honor please, I didn't hear what your [115] Honor said the last time. May I

(Testimony of Ralph G. Deede.)

object to the introduction of this document, which is made by another person, and this witness is not qualified himself as an expert. He is relying upon somebody else and it is therefore hearsay.

The Court: That is true. I stated the objection you made that he wasn't qualified was good, but I just wanted to find out what the Government value was.

Mr. Neblett: I am sorry, I didn't hear your Honor.

The Court: Just the personal property, that is all.

A. Well, I don't have the figure on the personal property separately. We have it in the records but I don't happen to have it with me. This plant was treated as a unit.

The Court: Well, give me the figure on the whole thing, then.

A. The fair market value as established by the Appraisal Division without the National Security Clause being placed on the property was considered to be \$2,597,555. As a result of the National Security Clause being placed on the facility the value was reduced to \$1,400,000.

Q. (By Mr. Peckham): Do you know, Mr. Deede, what the ultimate consideration—what the final consideration was which the defendant paid?

A. \$1,201,500.

The Court: That statement was, fair value of the machine tools, removable property, approximately \$369,000? [116]

(Testimony of Ralph G. Deede.)

Mr. Peckham: \$366,000, I believe it was, your Honor.

Mr. Neblett: That appeared in Paragraph 9 of the Letter of Intent, your Honor.

Mr. Peckham: Yes.

Mr. Neblett: Without the Security Clause.

A. No, with the Security Clause.

Mr. Neblett: \$366,000.

Mr. Peckham: That is with the Security Clause?

Mr. Neblett: No.

A. Yes.

Mr. Neblett: If I may interrupt Counsel, Paragraph 9 of the Letter of Intent which Counsel just introduced, provides "in the event of restrictions of the National Security Clause are removed from the personal property to be transferred, the Government will release the personal property of the lien of the chattel mortgage on the payment of the total amount not to exceed \$366,600." There is the figure that is established as without the Security Clause. That is the figure which was incorporated in the chattel mortgage as the fair value of the property in which the Security Clause is not mentioned.

Q. (By Mr. Peckham): Well, Mr. Deede, you don't have any records with you from which you can testify that the value set upon the personal property, \$366,000 without—subject to the National Security Clause.

A. Well, it is included in the bill of sale, that figure, and [117] the personal property was also

(Testimony of Ralph G. Deede.)

subject to the National Security Clause and appears so in the bill of sale, and there was a separate release value placed on the personal property because it was the purchaser's intent to get that lifted from the mortgage and they wanted a specific figure, so there was a figure of \$366,000 was arrived at on a pro-rated basis, based on the acquisition cost of the entire plant against the sales price of the entire plant. That is how we arrived at the fair value on the personal property.

Mr. Peckham: At this time, I don't think it will be necessary to introduce these documents by any testimony, any testimony concerning them. I think that Counsel is willing to stipulate as to the bill of sale that was delivered to your client.

The Court: This is not a trial, Mr. Peckham, you know, it is just a motion for preliminary injunction. That is enough record on that.

Mr. Peckham: So long as it is deemed properly admitted, there will be no need to have any further testimony regarding the bill of sale.

Mr. Neblett: We admitted in our answer to the Complaint that is a true copy.

The Court: Yes. Cross-examination now, Mr. Neblett?

Mr. Neblett: Yes, your Honor. [118]

Cross-Examination

By Mr. Neblett:

Q. Mr. Deede, will you read to me, please, that letter that you introduced a while ago with your

(Testimony of Ralph G. Deede.)

testimony relating to the designation of the property under this Security Clause.

The Court: That was a telegram?

Mr. Neblett: Oh, a telegram, yes, sir.

A. I will see if I can find it again.

Q. You pointed out in your testimony that the designation which was received from the Washington office of W.A.A.—that is the Chief Administrator?

A. Yes.

Q. And you have checked here Moore Dry Dock Company, Oakland, California, M.C.-70588. Was that the whole yard or the part sold to Oakland Dock and Warehouse Company?

A. That was the part that was—that fee owned portion and leasehold portion, plus a portion of the improvements that were put on the east yard that were owned by Moore Yard—Moore Dry Dock Company.

Q. You are talking about three parcels now?

A. That is right.

Q. One parcel you are speaking of is included in that designation, was a scrambled facility with Moore Dry Dock's yard as far as involved in these proceedings?

A. That is right. [119]

Q. Then you are also talking about some 40 acres on the east part of the Moore Dry Dock west yard?

A. Right.

Q. Is that under lease from the Western Pacific Railroad Company to the United States Government?

A. That is correct.

Q. Did I understand you to testify now, that the designation which you have referred to is a

(Testimony of Ralph G. Deede.)

designation of Western Pacific lease and a fee portion purchased by Oakland Dock and Warehouse Company designated as under a Security Clause?

A. That is right.

Q. Have you ever had any designation under the Security Clause of the portion purchased by the Oakland Dock and Warehouse Company?

A. It was all treated as one unit. The fee owned portion and the leasehold portion, all one facility.

Q. Then the designation there is a designation of the Western Pacific lease, which is about 40 acres, isn't it?

A. That is right.

Q. Upon which are built the ways, is that correct?

A. That is right.

Q. I show you copy of an exhibit which was introduced in evidence at the opening of the case, which is a map of the yard, and that map came out of your office? You recognize it, do you?

A. Yes. [120]

Q. The portion, Moore Dry Dock sales yard which we are talking about here includes these two pieces, the part sold to Oakland Dock and Warehouse Company and the part which is now held by the Government under Western Pacific lease. What I would like to develop from your testimony to see whether there is something which designates that part of the yard sold to Oakland Dock and Warehouse Company as being under the Security Clause, separately under the Security Clause.

A. This was never treated as a separate unit. This was all one unit, the fee owned portion as well

(Testimony of Ralph G. Deede.)

as the leasehold portion, and it was under the National Security Clause. This was never broken down as two units. This was one unit, declared by the Maritime Act.

Q. Is it still treated as one unit?

A. As far as the National Security Clause is concerned it is still treated as one unit.

Q. Then, as I understand your testimony, there has been no separate designation of it from Washington or any department you know in Washington of the part purchased by Oakland Dock and Warehouse Company, namely, the outfitting portion of the yard, is that right?

A. Well, there has been a segregation in this manner, that when we were unsuccessful in selling this leased portion and the fee portion as a unit, then we split them up. We sold the fee owned land and being unsuccessful in selling the leasehold [121] interest subject to the National Security Clause, we were directed by the Washington office as a result of the Munitions Board directive that the leasehold be transferred to the Federal Works Agency of the Industrial Reserve and maintained as part of the Industrial Reserve, which we did.

Q. You don't have that part under your jurisdiction any more?

A. No, that is part of General Services but it is being handled by a different Division.

Q. I hope I don't repeat myself too much, but have you got designation permitting you to split

(Testimony of Ralph G. Deede.)

that yard into the portion which has ways, that is, the Western Pacific leasehold and the portion on which the outfitting part of the yard is outfitted, the part sold Oakland Dock and Warehouse Company, to sell that subject to the Security Clause? Have you any designation of this half of the yard that the Oakland Dock and Warehouse Company has?

A. No, it is all treated as one and we don't need a special directive.

Mr. Neblett: I move to strike that portion of the witness' answer what they need.

A. I wanted to indicate it wasn't necessary we receive any directive. We have authorization from the Administrator that we can sell this property in any manner we see fit so long as it brings the highest rate to the Government, and in this case we were directed to sell the facility under the National Security Clause, and other than that we could sell it in any manner we wanted.

The Court: Of course what Counsel is getting at, under the provisions of the bill of sale it says nothing should be done to interfere with the property—I am paraphrasing this—which interferes with the—which would materially reduce the capacity of the plant to produce the items for which it was designed. Of course his point is that if there was just sold off part of it you wouldn't be able to produce the items for which it was designed.

A. That is not true, your Honor, by reason of the fact that we kept the leasehold portion that is still being maintained by the Government. It is

(Testimony of Ralph G. Deede.)

still kept as a unit so far as the operation is concerned.

The Court: It is?

A. Part of it is sold subject to the National Security Clause, and the rest of it the Government has spent a lot of money on it to maintain it as a unit. Otherwise we could have terminated our lease. But that is still being maintained as a unit regardless whether part of it is sold. The balance is still there and controlled by the Government.

Q. (By Mr. Neblett): Why didn't you sell the Western Pacific lease?

A. Because what we had was a leasehold interest and the restoration of this in connection with the lease was subject [123] to that, and subject to the National Security Clause. There was no value there. That was the reason we couldn't sell it. Nobody would assume the restoration obligation and conditions under the National Security Clause.

Q. Isn't it a fact the reason you didn't sell it, it came to your attention the lease of the Western Pacific portion to the Government was invalid and had not been properly renewed?

A. That hasn't been established yet.

Q. Didn't that come to your attention?

A. That came to my attention last week.

Q. Do you recognize the signature of Mr. Don H. Biggs?

A. Yes, sir.

Q. Is that his signature on that lease?

A. Yes, I would say it was.

(Testimony of Ralph G. Deede.)

Q. Who was Mr. Biggs at the time this letter was written, June 14, 1945?

A. He was Director of Disposals at that time.

Q. Is that the same position you have now?

A. That is correct.

Q. Do you recognize what that document is that I show you and I just handed to Counsel?

A. Yes.

Q. What is it?

A. It is a letter to the Oakland Dock and Warehouse Company transmitting a photostatic copy of the lease with the Western [124] Pacific.

Q. You are familiar with that lease, aren't you.

A. Generally, yes. I haven't looked at it.

Q. Would you say that is an accurate photostatic copy that was sent by your office to the Oakland Dock and Warehouse Company?

A. Yes, I believe it is, yes.

Mr. Neblett: We offer it in evidence to show, your Honor, the condition in which the Western Pacific lease is at this time and also at the time the property was purchased or was supposed to be designated.

The Court: All right, I will admit it. Mark it.

Mr. Neblett: I would be happy to make a copy of this lease available to Counsel for the Government if he would like to have it.

Mr. Peckham: Well, I would be glad to see it, but what I think, the facts are pretty well established as to the lease. The Western Pacific prop-

(Testimony of Ralph G. Deede.)

erty is leased by the Government and does contain this National Security Provision.

The Court: I think that may be true, but I will allow it in evidence.

Mr. Neblett: I believe that is all, your Honor, from this witness.

Mr. Peckham: Nothing further.

The Court: All right.

(Witness excused.) [125]

The Court: I think you better put on the witnesses that are not really connected with this case first so they won't be kept waiting.

Mr. Peckham: Surely. I will call Mr. Wille of the Moore Dry Dock Company.

ANTON L. WILLE

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Anton L. Wille.

Direct Examination

By Mr. Peckham:

Q. Mr. Wille, are you the Purchasing Agent of the Moore Dry Dock Company?

A. That is correct.

Q. And how long have you acted in that capacity? A. About eighteen years.

Q. Now,—that is continuous. You were with the Moore Dry Dock Company at the time that they

(Testimony of Anton L. Wille.)

were using the west yard of the Moore Dry Dock Company that has been referred to in this case?

A. That's correct.

Q. In fact, Mr. Wille, did you have anything to do with the procuring with the tools that are located in that plant?

A. We purchased all of them through my division, through my department. [126]

Q. Now, are you familiar with the machine tools that are located in that plant at this time?

A. With a great many of them, yes.

Q. And you have been in the plant since the Moore Dry Dock Company ceased operation of the plant?

A. That is correct.

Q. Now, would you describe for his Honor generally the type of machine tools that are found in the establishment there, the Oakland Company yard?

Mr. Neblett: Your Honor please, we object to that question on the ground it is not the best evidence as a complete inventory of the War Assets Administration has and we have a copy of it, of the type and kind and character of the machinery. I object to that question; that is not the best evidence.

Mr. Peckham: Well, I was just expediting matters.

The Court: It may not be. Just tell me generally; I suppose it is lathes and planers and——

The Witness: Grinders and drill presses.

The Court: Drill presses, all that.

(Testimony of Anton L. Wille.)

The Witness: Some small lathes up to large lathes, sixty to seventy-two inch.

The Court: All that?

The Witness: That is right.

The Court: Did you buy from Bulotti and Moore Machining?

The Witness: That is correct. [127]

The Court: I have a general idea. I was attorney for Moore Machinery.

Q. (By Mr. Peckham): Mr Wille, have you, were you acquainted in your capacity as purchasing agent with the conditions of the market in machine tools during the present time?

A. That's right.

Q. And referring now, directing your attention now to the heavy special purpose type of machine tool that is found there at the Oakland Company yard would you tell us what—how easily that type of machine tool can be procured at the present time?

A. Well, on the heavy tools you probably have to wait four to six to eight months for some of them, maybe a little bit longer for the extra large lathes like you find over there, sixty inch, and so forth.

Q. And there is that type of machine tool located there at the Oakland Company?

A. That's correct.

Q. And——

The Court: Is there that much lag in the tool machine business?

The Witness: On the large tools, yes, your Honor.

(Testimony of Anton L. Wille.)

Q. (By Mr. Peckham): In other words, it would—a period longer than a hundred and twenty days would be required to procure the special purpose type of machine tool that you find at Oakland?

A. On some of the large tools I would say yes.

Mr. Neblett: I object to this line of questioning. No issue raised on how long it would take to procure these tools.

The Court: I think it is relevant on the question of irreparable damage. In other words, should a war start tomorrow six months to get the lathe would be some evidence of irreparable damage.

Q. (By Mr. Peckham): Now, Mr. Wille, do you—put it this way—when did you last see the machinery, machine tools there at the Oakland Company; do you recall?

A. Last time I was over there was about in—in the machine shop about four or five months ago.

Q. I see, and your company recently purchased a Blanchard grinder from the Oakland Company?

A. That is right, two weeks ago.

Q. Have you seen that Blanchard grinder?

A. No, I have not seen that personally; I didn't look at it.

Q. From your long experience as a purchasing agent of machine tools, what is the useful life of equipment such as the equipment that you find there at Oakland Company yard?

A. Under normal working conditions we assume about twenty years, fifteen to twenty years. If it is

(Testimony of Anton L. Wille.)

abnormal, working three shifts, then it is going to be proportionately less.

Q. Now, Mr. Wille, as a purchasing agent during the years of 1940 through 1945, would you describe to his Honor the conditions that existed in the market, machine tool market, [129] as to the purchase of special purpose machine tools, as to how readily procurable they were?

A. During the—in the early '40's?

Q. Yes.

A. Many of those tools we waited, oh, from five to twelve, fifteen months before we could get delivery of them.

The Court: They were a drug on the market about 1939, business was bad, and from then on business was very good.

The Witness: That is correct.

The Court: I know those facts and take them into consideration. I was director of the Moore Machinery Company for a long time, so I know what is going on.

Mr. Peckham: Your Honor, I just asked for the record at the last National Emergency there was difficulty in procuring machine tools.

The Court: Of course, that doesn't apply. That was back in 1940, the question now what is the time.

Mr. Peckham: Yes, in the event there would be a National Emergency, assuming those conditions would exist again.

No further questions.

The Court: Let me ask you this: This one-half

(Testimony of Anton L. Wille.)

of the so-called yest yard, the part that was leased from the Western Pacific, can that be operated as a ship repairing or ship fitting plant?

The Witness: I believe it can with the addition of some [130] dry docks.

The Court: Have to have some dry docks?

The Witness: That is correct.

Cross-Examination

By Mr. Neblett:

Q. Mr. Wille, you said the normal rate of depreciation on this machinery tools and equipment would be fifteen to twenty years?

A. That is what we figure it, that's right.

Q. What rate of depreciation do you take on your yard on your income tax?

A. I believe it is twenty years on the heavy tools.

Q. Well, what about such tools as electric welders and mobile cranes and things of that sort?

A. They are mostly in the five year category.

Q. In the what? A. Five years.

Q. What about small tools such as screwdrivers, drills and things of that sort?

A. We call those expendable. They are depreciated the minute they are purchased.

The Court: You don't mean drill presses?

The Witness: No, no; small portable drills and drills, such things as electric and pneumatic drills.

Q. (By Mr. Neblett): What about cranes, Wurlley cranes?

(Testimony of Anton L. Wille.)

A. I think they come within the ten year class. I wouldn't [132] bet on that on the Wurleys.

Q. Isn't it a fact that the Navy Department and the Maritime Commission builds a yard such as the Moore Dry Dock Company west yard with the idea they will be almost depreciated and gone four years after they are constructed?

A. I believe that applies to the building ways and piers and the temporary buildings. I don't believe that applies to the machine tools.

Q. That is true of the ways on the Western Pacific lease and piers that are built?

A. I believe that is correct; yes, sir.

The Court: Didn't that apply originally to the time they are constructed there, wasn't there a five year allowance by the Internal Revenue laws?

The Witness: I believe, I am not sure. I am not positive whether that covered the tools or not. I know it covered the buildings and ways, piers, built on a three or four year basis, but——

Q. In other words, nothing in a shipyard is good for ship repair or ship building after four or five years, is that right?

A. It could be for ship repair, because after all you can rehabilitate those facilities; in fact, some of them were rehabilitated before the war was over.

Q. They had been rehabilitated, is that right?

A. That's right. [133]

Q. But the normal life considered by the Maritime Commission is four years, isn't it?

(Testimony of Anton L. Wille.)

A. For the general yard, the yard in general, I believe that is correct, yes.

Q. And the general depreciation allowed by the Income Tax Department is about seven years, isn't that right?

A. That I am not qualified on. I am not in the accounting division, I wouldn't know that for sure.

Q. When was this yard built?

A. I believe we started early in 1941, late '40 or early '41 when we put the first work in there.

Q. So it is about nine years old?

A. Practically, yes, sir.

Q. And the machinery and machinery tools and equipment, such as heavy cranes and things of that sort are gone, according to your calculation, in about ten years, is that so?

A. That's right, some of them.

Q. And on heavy machinery of that type are being depreciated very rapidly beyond use after about ten years, any kind of machinery, isn't that so?

A. All of it needs maintenance and service. Machines out in the weather are far worse off than under cover.

Q. Do machine tools and machinery go to pieces more quickly when not in use than when they are in use?

A. Well, from experience I will say it doesn't do them any [134] good when they are not in use.

Q. Well, most of the—in other words, they de-

(Testimony of Anton L. Wille.)

preciate very rapidly if they are not in use, standing out in salt air with no maintenance?

A. That is quite true.

Q. Never been any maintenance on this yard, isn't that so?

A. I don't know what they have done since late '45. I don't believe it has had much maintenance.

Q. It has been watched and for the purpose of looking after the machinery tools and equipment to keep them from disappearing and also watch them from the standpoint of fire hazard, I guess, is that so?

A. I believe so.

Q. Isn't that about all that has been done?

A. That I wouldn't know, because I am not qualified. I haven't been over there to see. I do know some of the machine tools have been in use for the last four or five years under lease.

Mr. Neblett: That is all.

Mr. Peckham: Just one or two questions.

Redirect Examination

By Mr. Peckham:

Q. The Moore Dry Dock Company has purchased recently machine tools from the Oakland, Company, has it not? A. That is correct.

Q. And has it put those machines in use? [135]

A. I believe they are all in use now, that's right.

(Testimony of Anton L. Wille.)

Recross-Examination

By Mr. Neblett:

Q. Has there been any rehabilitation of them?

A. Personally I do not know.

Mr. Neblett: No further questions.

Mr. Peckham: That is all.

(Witness excused.)

Mr. Peckham: Mr. Bulotti.

CHARLES F. BULOTTI

called as a witness on behalf of the Government,
being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Charles F. Bulotti.

Direct Examination

By Mr. Peckham:

Q. Mr. Bulotti, you are the owner and operator
of a machine company, are you not? A. Yes.

Q. And that is the Charles Bulotti Machinery
Company? A. The C. F. Bulotti Machinery.

Q. Yes. And you have been engaged in that
business for a number of years? A. Yes.

Q. And you were familiar with much, are you
familiar with any of the machine tools that were
supplied to the west yard of [136] the Moore Dry
Dock Company in Oakland, California?

A. Quite a few of them, because we sold them.

Q. Are you familiar with special purpose ma-

(Testimony of Charles F. Bulotti.)

chine tools that were furnished to the Oakland Company, to the Moore Dry Dock yard?

A. Well, now, the definition of special purpose is a little bit confusing, but those machine tools in general, I am familiar with them.

The Court: You can gig and lag a machine tool for a special purpose job?

The Witness: Yes.

Q. (By Mr. Peckham): Well, as to the heavy equipment, Mr. Bulotti? A. Yes, sir.

Q. Could you testify as to how readily it is procured at the present time?

A. Yes, I had occasion to check my records this morning. I find on the larger lathes, such as fifty inch size, it would require from sixteen to twenty weeks. A sixty inch by fifty-one foot, the very long lathe, probably be six months up. Not many of them made. There were only two sources of supply in the country for the very large lathes.

Q. Would you testify, Mr. Bulotti, as to the length of usefulness of heavy type of machine tools?

A. Well, some tools that my old company sold during World [137] War I are still in use; that was in 1916. They have a big boring mill machine since 1916, have some lathes bought at the same time, still in use.

The Court: Of the larger machine tools, what do they have over there?

The Witness: A sixteen foot boring mill, eight foot lateral drills, then they have two or three Gid-

(Testimony of Charles F. Bulotti.)

dings and Lewis and horizontal boring machines, and a big seventy-two or eighty-four king mill, then, of course, there are the large presses that came from Chicago; they were used, I think, in the plate shop, they call it, but the heavy machine tools are very slow in delivery, even as of this date.

The Court: What was this machine tool that was sold recently?

Mr. Peckham: Well, it was——

The Court: What did it consist of?

Mr. Peckham: A turret lathe and a Blanchard grinder.

The Witness: Turret lathes are now about sixteen weeks and a Blanchard grinder, I am not in a position to state, because I have no comparable lathe.

Q. (By Mr. Peckham): Being familiar with the machine tools that are located there at the yard, Mr. Bulotti, would it be your testimony that the machine tools that are necessary to operate the yard, could not be assembled within 120 days, could not be procured? [138]

A. That is true, with the exception of one or two small items; I would say that is true.

Mr. Peckham: No further questions.

Cross-Examination

By Mr. Neblett:

Q. These machine tools and equipment you spoke of could be obtained from sixteen to twenty weeks, have you bought any lately?

(Testimony of Charles F. Bulotti.)

A. We received monthly——

Q. Have you bought any lately; answer the question. A. No, sir.

Q. When did you last buy any?

A. Six weeks ago.

Q. How long did it take to get delivery?

A. Three months.

Q. What did you buy?

A. A small turret lathe.

Q. When you testified a while ago that it would take 120 days that these tools couldn't be supplied within a 120 days, you are aware that 120 days are four months? Now, you say you bought some of these machines, tools, and they were delivered in three months, did I understand?

A. Small. I will give you one in a week, also. We get monthly lists from the factory and I have made it my job to look at that list this morning, and you can't get a large lathe in less than six months. When you ask me if—there has been no [139] demand for machine tools.

Mr. Neblett: I move all of the witness' testimony based upon the subject that he received a list from the manufacturers, that is hearsay and not the best evidence, that doesn't prove when manufacturers can manufacture and sell.

The Court: I will let the evidence stand because the witness testified to the effect that it takes from sixteen to eighteen weeks to six months to get machine tools of this character and if you want to have him qualified any more for the record, I know

(Testimony of Charles F. Bulotti.)

him to be a very qualified individual, has been in the machine tool business and for years one of the biggest operators on the Coast.

Mr. Neblett: I won't pursue it any further.

The Court: Yes.

Mr. Neblett: I believe that is all.

(Witness excused.)

Mr. Peckham: Admiral Klein.

GROVER C. KLEIN

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Grover C. Klein, Rear Admiral, U. S. Navy.

Direct Examination

By Mr. Peckham:

Q. Admiral Klein, what is your present position with the United States Navy? [140]

A. Inspector General for the Bureau of Ships.

Q. And you are stationed here in San Francisco?

A. I am.

Q. And what are your duties, sir?

A. To make such inspections of the facilities and management control installations under the Bureau of Ships as the Chief of the Bureau of Ships or Command, Western Sea Frontier, may order.

Q. Prior to your assignment as Inspector Gen-

(Testimony of Grover C. Klein.)

eral, Admiral, were you an assistant, were you the Assistant Chief of Bureau of Ships for Facilities at Washington, D. C.? A. I was, sir.

Q. And during what time did you act in that capacity?

A. From April of 1947 until April of 1950.

Q. Will you state briefly for His Honor your duties in that capacity?

A. Well, I had general charge of the sections which were concerned with facilities used and required for the Bureau of Ships for its peace time uses and for its mobilization plans. In addition, we—our division had charge of the organization of the yards and of its labor relations.

Q. In your capacity with the Bureau of Ships as an Assistant Chief in 1947, do you know, Admiral, did you have any knowledge of the designation of the west yard of the Moore Dry Dock Company as part of the Industrial Reserve? [141]

A. I would have knowledge of that, yes.

Q. Did your section or bureau have, did it make the determination?

A. We did not make the determination. We made the recommendation to the Munitions Board that the determination be made and the Munitions Board made the determination to place the plant within the Reserve.

Mr. Neblett: Your Honor please, I didn't know what the witness was going to testify to on that last. I move that part of his testimony be stricken

(Testimony of Grover C. Klein.)

out, that the Munitions Board made the determination, because it isn't the best evidence.

Mr. Peckham: Your Honor, as I understand it, though I may be mistaken, on a hearing on an application for preliminary injunction where evidence is offered, there is a greater latitude given as to evidence.

The Court: Well, of course, what the—among the records isn't there a determination of designation signed by the Munitions Board, by Major General Timerlake?

Mr. Neblett: That is attached to the Complaint, or affidavit, I have forgot which, a letter dated May 7, 1948, signed by Major General Timberlake. That letter doesn't designate it, it merely—it is merely sent in 1948 to the General Services of the War Assets Administration it was then, saying in effect holding it open thirty days and another designation to be made. Never any designation made at all, [142] your Honor, even that letter. That letter merely says that there is attached hereto a tentative list of 114 facilities he considered necessary to the national defense and consequently should be disposed of by the National Security Clause. Continuous studies are continuing with regard to the facilities on this tentative list and it is anticipated that within approximately thirty days certain deletions may be possible. The Military Department expect to continue field checks on the physical condition on most of these facilities. Therefore, it is requested that your field organiza-

(Testimony of Grover C. Klein.)

tions be asked to cooperate by permitting them to make a physical inspection of these properties.

The Court: Well, Admiral, how do you know they were designated?

The Witness: We placed before the Munitions Board a list of the facilities which were necessary for the Bureau of Ships to carry on its mobilization plans. We received information from the Munitions Board that we, the Bureau of Ships, could use those plants in our plans, and as a result of that we designated the present yard under discussion as the building yard for certain ships in our mobilization plans. Now, that was the sum and substance of it.

The Court: You did that on the assumption that the letter had been drawn?

The Witness: No, we had word from the Munitions Board those plants were available to us. [143]

The Court: That was by letter, was it?

The Witness: Yes, sir.

The Court: Have you got a copy of the letter?

The Witness: No, sir, I don't have. It is in the files in Washington.

Mr. Peckham: On this question of designation, your Honor, there is—that list, the instructions that Mr. Deede has testified to the War Assets Administration received, the provisions themselves, and the deed and the bill of sale.

The Court: Let us not discuss what the evidence is.

Mr. Peckham: Yes, your Honor.

(Testimony of Grover C. Klein.)

The Court: I have to adjourn on this case to another one at 3:30 and have to take this in the morning, but suppose you finish with your witnesses today. Will you be able to?

Mr. Peckham: Well, I think—this just about completes our—one or two more questions, your Honor.

The Court: All right.

Q. (By Mr. Peckham): Well, Admiral Klein, you're familiar with the type of construction and ship repairing that took place during the war at Moore Dry Dock Company?

A. Not in detail, not the type of construction. I am familiar with the general layout of the plant from the plans only and the type of ship we can build there. I am not at liberty to disclose what ships we have programmed for there, but we have ships programmed and they are the type that can be built there. [144]

The Court: You mean with the tools that are there now?

The Witness: With the tools that are there now, augmented to some extent with additional tools, and by having certain fabrication done at other plants.

Q. (By Mr. Peckham): Admiral, this plant is considered as one of the essential plants in the Industrial Reserve necessary in the case of a National Emergency?

A. That is correct.

Q. Now, Admiral, during the past National

(Testimony of Grover C. Klein.)

Emergency, during the past war, particularly the early part of the war, were you familiar with the conditions that existed in the mobilizing of plants and the equipment of plants? A. I was.

Q. Of this type. And would it be your testimony that this plant could not be assembled in a 120 days, in the event that the machine tools have been disposed of?

A. That is correct, the machine tools and the weight handling equipment.

The Court: You mean by that the cranes?

The Witness: Yes.

Q. (By Mr. Peckham): And the Department of Defense looks upon this yard as necessary for the National Defense as an integrated yard?

A. I can speak for the Bureau of Ships, yes; but not for the Department of Defense, I am sorry. The Bureau of Ships as a [145] part of the National Defense establishment does look on this as a Reserve plant required for our mobilization plans in case of an emergency, and also the timing, the phasing of the construction of ships will require its use within 120 days.

Mr. Peckham: No further questions.

Cross-Examination

By Mr. Neblett:

Q. Admiral, could the yard be used with the piers in the general condition of the yard now? Could it be used now or be back at work in 120 days?

(Testimony of Grover C. Klein.)

A. I have not seen the yard, but from the information I gather from people and from—from people who have seen it and from the records I would say it would be difficult.

Q. Does your information on the, say, Western Pacific lease where the ways are, is it your information that the ways are pretty badly deteriorated at this time?

A. Yes, but not to the extent it would require an inordinate time to put them in commission. In ship building you have a certain period of time where you fabricate material and it don't require the ways.

The Court: Will you excuse me just a minute? All right, go ahead.

A. I say there is a period of time during the earlier part of putting a shipyard into operation when the ways are not required. It is a fabrication period. You have your plans to get ready and a certain period where you are fabricating before you go [146] directly on to the ways.

Q. (By Mr. Neblett): Well, is it your information now that the piers on the outfitting portion of the yard, the part owned by Oakland Dock and Warehouse Company are deteriorated to the point where they couldn't be used without extensive repair and even replacement? Is that your information?

A. For ship building?

Q. The ship repairs.

A. Piers are only used in a ship building plant for outfitting. That is to say, they do not come

(Testimony of Grover C. Klein.)

until after launching. The piers could be rehabilitated even though they were deteriorated down to the water line where the piles are rotted off, in my opinion, within that period.

Q. How long is that?

A. Seven or eight months.

Q. Could you use the yard at all as an outfitting yard or ship repair yard until the piers were rehabilitated?

A. You could use it as a ships construction yard.

Q. What?

A. Ships construction yard. Building ships. Your shops are usable in the early part. You have your plans and material. You start the fabricating. From the fabricating shops you go to the ways, and from the ways to the piers for fitting out. Now, there is a hiatus or period of time from the time you receive your material until that material is fabricated and [147] then from then until your ship is off the ways until you put it to the fitting out here. If you ask me can the piers be used for repair until rehabilitated I couldn't tell you even if I looked at them.

The Court: Well, there was testimony this particular property that was purchased by the defendant here could not be used for ship repair or rehabilitation of ships until the ways were repaired.

A. Well, sir, I believe we are concerned here with language. In ship building ways are the lo-

(Testimony of Grover C. Klein.)

cation with launching ways on which ships are constructed from the keel up. Our outfitting piers or conversion piers are piers that stick out into the water along which you can bring a ship and work on it while it is afloat. I am not sure I understand what the testimony was before, but speaking of ways, ship building ways, it isn't concerned with the business of conversion or repairs.

The Court: I see.

Q. (By Mr. Neblett): Admiral, do you recall having met Mr. Agostini and myself in Washington?

A. I recall meeting you, sir. I don't recall meeting Mr. Agostini.

Q. Well, Mr. Agostini is President of the Oakland Dock and Warehouse Company. A. Yes.

Q. But you do recall that I spent around seven months on this [148] problem? A. Yes, sir.

Q. In which I interviewed your assistants many times, Captain Gridley and——

A. That is right.

Q. ——Mr. Stein and others and had some interviews with you, also. A. That is correct.

Q. Do you recall that out of these discussions with you and others the Munitions Board finally re-formed and modified the quit claim deed with respect to the property?

A. I don't recall that as a matter of knowledge from my activities there, but I do recall seeing a piece of paper which indicated that that was done.

(Testimony of Grover C. Klein.)

Now, that is the extent of my personal knowledge of it.

Q. Well, I don't recall now whether you were there or not, but I will ask you: At one time the question came up with Captain Zitswitz. He was your superior and in the Engineers?

A. He is the same ilk I am. He is Engineering duty only and shipbuilding.

Q. You and he are both Annapolis men?

A. That is correct.

Q. You don't recall anything further happening after I saw you the last time, which was, I think, some time in January of this year? [149]

A. Well, I recall many things happening, but as this case——

Q. I am talking about this case, of course.

A. Yes.

Q. I won't pursue that question any further.

Mr. Neblett: That is all from this witness, if your Honor please. The witness says he doesn't remember the modification.

The Court: Well, you have the modification in the record, anyway.

Mr. Neblett: Yes, your Honor.

Mr. Peckham: Yes.

The Court: Is it in the record?

Mr. Peckham: If it isn't we certainly can stipulate it be placed in. I believe it is attached to the counter affidavit of Mr. Agostini.

The Court: I have another matter now. Are you finished?

Mr. Peckham: Yes.

The Court: I have another matter that is coming up that has to be decided before the Grand Jury meets tomorrow, and would it be all right with you, Mr. Neblett and Mr. Peckham, to continue this matter tomorrow at 10:30?

(Colloquies between Court and Counsel omitted.)

The Court: I think I can finish the calendar by 10:30 and we can start in and continue this case then. Continue this case until 10:30 tomorrow morning.

(Thereupon this cause was adjourned to Wednesday, June 21, 1950, at the hour of 10:30 a.m.) [150]

Wednesday, June 21, 1950, 10:30 o'Clock A.M.

The Court: United States versus Oakland Dock & Warehouse Company.

Mr. Peckham: Ready for the Plaintiff.

Mr. Neblett: Ready for the Defendant.

Mr. Peckham: Your Honor, yesterday we completed our oral testimony. At this time I would like to ask, if Counsel has no objection, that the reports of Congress of the Munitions Board pertaining to the National Industrial Reserve be admitted in evidence.

The Court: Those you referred to in your argument?

Mr. Neblett: No objection. I would like for Counsel to identify the two reports by date.

Mr. Peckham: Report to Congress on April 1, 1949, and the second volume is Report to Congress of the Munitions Board of April 1, 1950. One exhibit will be all right.

The Clerk: Plaintiff's Exhibit 3 introduced and filed in evidence.

(Whereupon the Report above referred to and marked Plaintiff's Exhibit 3 was received in evidence.)

The Court: You rest, do you?

Mr. Peckham: Yes.

The Court: All right, proceed with your evidence. [152]

Admiral Klein, please.

Mr. Neblett: Admiral Klein has been sworn.

GROVER C. KLEIN

having been previously sworn, called as a witness on behalf of the defendant.

Mr. Neblett: Your Honor, before I proceed with this witness, may I offer in evidence on behalf of the defendant the Answer, the verified Answer of the defendant to the Complaint, and the Affidavit of Mr. Agostini, President of the corporation, which appears in the files.

The Court: All right, admitted.

Direct Examination

By Mr. Neblett:

Q. Admiral Klein, when did you first come in contact with this proposition of the Oakland Dock

(Testimony of Grover C. Klein.)

& Warehouse Company, first to remove the security clause altogether from the properties, and then later to modify it?

A. Well, I can't recall, I cannot recall the exact date, but to the best of my recollection it was some time in 1948.

Q. Well, keeping in mind that the Oakland Dock & Warehouse Company purchased the property on June 1, 1949, and that the application of the Oakland Dock & Warehouse Company was filed July 12, 1949, some time shortly after that, I suppose?

A. It must have been in 1949, rather than in 1948, but without the documents to refresh my mind I cannot recall the exact time [153] of the transactions. There were so many of them that we handled.

Q. Well, the first time that you and I had a conference with Captain Zitzswitz and Mr. Wheeler, Mr. Wheeler was representing the Oakland Dock & Warehouse Company with me; you remember him, do you not? A. I do, yes.

Q. The Company lawyer that appeared with me?

A. Yes.

Q. And that was some time in the fall of 1949, was it not, we first got together?

A. That could be. I am sorry I can't recall these times. As I say, there were many transactions that had to do with the disposal of property and with the application of the National Security Clause.

Q. Who is the Honorable John T. Koehler?

(Testimony of Grover C. Klein.)

A. He is now the Assistant Secretary of the Navy.

Q. He was during 1949 also, was he not?

A. To the best of my recollection, yes. He was also the Counsel for the Bureau of Ships prior to the time he became Assistant Secretary of the Navy, and I do not recall the exact date when he changed office.

Q. Well, as a matter of fact, it was in February, 1949; that is about right, isn't it?

A. Sounds reasonable.

Q. And he was—did he have any position on the Munitions Board [154] in 1949 and 1950?

A. Well, he has had the position on the Munitions Board to my knowledge, yes. At one time I believe he was Acting Chairman of the Munitions Board.

Q. But at all times since around June 1, 1949, Mr. Koehler has been the Navy Member of the Munitions Board, isn't that true?

A. I am sure he was, but I can't testify to a paper that I saw to that effect.

Q. Just asking you from your general knowledge.

A. Just general knowledge, yes he was, and he acted as a member of the Munitions Board, that is correct.

Q. And for a time when the Board had no Chairman, Mr. Koehler was Acting Chairman, isn't that true?

(Testimony of Grover C. Klein.)

A. That is correct, from my general knowledge.

Q. Do you know Mr. Koehler's signature?

A. I do.

Mr. Neblett: I am showing counsel a letter I am going to show the witness.

Q. Admiral, I show you a letter dated September 16, 1949, written on Munitions Board stationery, dated Washington, D. C., purportedly signed by John T. Koehler, Acting Chairman. Is that Mr. Koehler's signature?

A. I would say that it is.

Mr. Neblett: If Your Honor please, I would like to read this [155] letter into evidence, if I may.

Munitions Board, Washington 25, D. C.,
16 September, 1949.

Messrs. Neblett, Mayock & Wheeler,
Washington Hotel, Washington, D. C.
Oakland Dock & Warehouse Co.

"Dear Sirs:

"This will acknowledge receipt of your letter of September 12, 1949, addressed to me as the Assistant Secretary of the Navy in which you replied to mine of September 9, 1949, which I signed as Acting Chairman of the Munitions Board.

"The matters you now discuss are by and large the same as those which you brought to our attention in earlier letters. It is my view that our position on these matters is adequately stated in the letter that I sent you a copy of on September 9. You contend that the Munitions Board miscon-

(Testimony of Grover C. Klein.)

strued the subject matter of your Petition, which you describe as one for the removal of the dormant estate on the subject property and which we have referred to as one for removal of the National Security Clause.

“Notwithstanding the fact that the deed speaks in terms of dormant estate and we speak in terms of National Security Clause, we are really talking about the same thing. Public Law 883, 80th Congress, [156] defines the National Security Clause as those terms, conditions, restrictions and reservations formulated for insertion in instruments of sale or lease of property determined to be a part of the National Industrial Reserve which will guarantee their availability of such property for the purposes of national defense.

“In your deed these terms and conditions commence on Page 3 with the words, ‘and subject to the following covenants and conditions’ and run through to the words on Page 6 ‘shall furnish evidence of such recordation to the War Assets Administration.’

“In your Bill of Sale they commence on Page 1 with the words ‘the Government-owned portions’ and run through to the words ‘dormant estate mentioned above.’

“On Page 2 these are the provisions which I assume you are seeking to us or asking us to waive and which the Board at its meeting of September 8, 1949, declined to remove.

“I should like to repeat the suggestion made in

(Testimony of Grover C. Klein.)

our letter of the 9th that you advise us of any specific plans you may have for utilizing the property which would require a modification or waiver of some of the restrictions in the instruments of conveyance. Such advice would happen to decide whether individual [157] exceptions can be granted in those instances.

“Sincerely yours,

JOHN T. KOEHLER,
Acting Chairman.”

Q. Admiral, were you familiar with this letter about the time it was written or not?

A. I must have been, because I was there at that time and I now recall the time when you were in Washington and requested a modification of the National Security Clause, and if my recollection serves me correctly, you were in the office and were interested in getting certain portions of the land released in order that you might build a building. Is that the time you speak of?

Q. That is one of the times, Admiral. I recall that time quite distinctly.

A. That you had this letter; I'm not sure as to time.

Q. Now, you don't have the file, of course, but do you recall that the first application Oakland Dock & Warehouse Company made was on July the 12, 1949, and that application was to remove the security clause entirely; do you remember that?

(Testimony of Grover C. Klein.)

A. I can't state that I remember the specific time. I do know that your company and you requested to have the National Security Clause removed; I do know that.

Q. And that is what Mr. Koehler was speaking about in this letter when he said that application was denied? [158]

A. And then subsequent to that you—we suggested that we might be able to release or relieve some of the land that was back from the piers in order that you might build a warehouse.

Q. There were all sorts of proposals and counter proposals made. A. That is correct.

Q. As I recall there is a very big file on it, isn't there? A. There is.

Q. And do you recall then that Mr. Agostini and I, with Mr. Wheeler—I don't say you saw Mr. Agostini because you said you don't recall—following this letter of September 16 we went before the Navy and the Munitions Board and made application to modify the Quit Claim Deed; do you remember that?

A. I do not recall that. I believe that question was raised yesterday, and the only recollection I have of that part of the transaction was the file. I saw—is that I saw in the file some modifications of it at a subsequent date. I do not recall the occasion when or what led up to the time that the deed was modified.

Q. Well, do you recall when these discussions came up about modifying the deed in accordance

(Testimony of Grover C. Klein.)

with the subject matter in Mr. Koehler's letter of September 16 which I believe, which has been marked by the——

The Court: Hasn't been marked yet, but you can mark it.

The Clerk: Defendant's Exhibit—— [159]

The Court: You have marked one exhibit in here, haven't you, for the defendant?

Mr. Neblett: Yes, Your Honor, I have forgotten the number.

The Clerk: Is this for identification?

The Court: Yes, Exhibit B.

The Clerk: Defendant's C introduced for identification.

The Court: Yes. I will admit it in evidence, not for identification. Just admit it in evidence.

The Clerk: Defendant's Exhibit C admitted in evidence.

(Whereupon the document above referred to and marked Defendant's Exhibit C was received in evidence.)

Q. (By Mr. Neblett): Do you recall then that we went back to the Munitions Board; you were there, I know you had a thousand and one of these things and I must *say your* defense at that time, if one is needed, that I was working on only one thing, and you were working on a dozen. That is the reason I am asking you to refresh your memory on these questions.

Do you recall that from your information under

(Testimony of Grover C. Klein.)

the Department generally that Mr. Mayoek and Mr. Wheeler and I with Mr. Agostini went back to the Department and asked for a re-designation of this property as a terminal warehouse facility?

A. No, I don't recall any time where you asked to have it re-designated as a warehouse facility. I do recall that you requested that you be relieved of the National Security Clause to the [160] extent that you could build a warehouse on the property.

Q. Well, that is about the same thing.

A. And we had considerable discussion with you as to the location where it might be put so as not to interfere with the purposes for which we had it programmed.

Q. Who is Captain W. F. Christmas?

A. Christmas is one of the Assistants of Code 750 which has to do with mobilization planning. I believe that he has now been relieved of those duties.

Q. I mean what he was then, wasn't he attached——

A. At what time, now?

Q. I am talking about the time we are talking about, from June 1, 1949, until this modified Quit Claim Deed was executed on February 28, 1950?

A. I do not believe that he was attached to that Code for that whole period. My recollection is that he came there in the Fall, late Fall of 1949, and has now been relieved as the Assistant of Captain Hamilton.

(Testimony of Grover C. Klein.)

Q. Do you know Captain Christmas well?

A. Oh, yes.

Q. Would you know his signature?

A. I believe I would.

Q. I have shown this letter to counsel, if the Court please.

A. This was the period of time, this letter is dated and was actually during the period of time that Captain Christmas was [161] attached to the Munitions Board. He was, before he came into Code 750 of the Bureau of Ships, attached to the Munitions Board, and this letter undoubtedly was executed during that period of time, and is dated 18 October. That would show that Captain Christmas was still attached to the Munitions Board in October of 1949 and that he represented the Bureau of Ships some time subsequent to that date, which was probably the late Fall.

Q. There is no doubt about his authority to write that letter for the Munitions Board, is there?

A. I can't testify as to that. I wasn't attached to the Munitions Board, but my assumption would be that he was authorized to write the letter.

Mr. Neblett: We offer this letter in evidence, if Your Honor please, and I would like to read it to the Court.

The Clerk: Defendant's Exhibit D, introduced and filed in evidence.

(Whereupon the letter above referred to, dated 18 October, 1949, and marked Defendant's Exhibit D, was received in evidence.)

(Testimony of Grover C. Klein.)

Mr. Neblett: On the letterhead:

“Munitions Board,
“Washington 25, D. C.

“18 October, 1949.

“Mr. William H. Neblett,
Oakland Dock & Warehouse Company
Washington Hotel,
Washington, D. C. [162]

“Dear Mr. Neblett:

“In conference with your Mr. Welburn Mayo-
ock, in the office of Captain Walter F. Christmas,
yesterday, it was agreed that Mr. Mayoock would
submit a new proposal to the Munitions Board ask-
ing that the National Security Clause be retained
on the Oakland Dock & Warehouse Company prop-
erty in question as a terminal warehouse rather
than a shipyard. It is assumed that this new pro-
posal will make unnecessary replying to your letter
of 4 October, 1949.

“Sincerely yours,

“W. F. CHRISTMAS,

“Captain, U.S.N., Assistant Chief Office of Pro-
duction Planning.”

Q. Do you recall that we filed such an applica-
tion, Admiral, for modification of the Quit Claim
Deed?

A. Well, I believe that is the same question I
answered a moment ago. I do not recall your filing
the application or the conference that went on, that

(Testimony of Grover C. Klein.)

preceded the modification of the Quit Claim Deed. I don't recall that. The only recollection I have of that is seeing in the files a modification of the Quit Claim Deed.

Q. You knew that we were discussing the matter from time to time with Captain Zitzewitz, your assistant, is that right?

A. As to the use of the property, yes.

Q. And you recall also of meeting, that you went with Mr. [163] Wheeler and myself on two occasions, if my memory serves me right those meetings were in January of 1950, or about that time, and at that time you recall our discussing at length the plan for the building of terminal warehousing and refrigeration plants on this property, and asking that the Security Clause on the land be modified so that we could establish both buildings; do you remember that?

A. I recall that we had a lengthy discussion as to the use of the land for terminal warehouses, and how we could fit the buildings that you had proposed to build as terminal warehouses to its future use as a shipbuilding plant. But I do not recall a discussion which would lead to the modification of the Deed to the extent that the National Security Clause would be removed.

Q. I don't recall any such discussion either. I do recall discussions that as to the land we were asking you to modify the Security Clause in the Quit Claim Deed. You will recall that—do you re-

(Testimony of Grover C. Klein.)

call that we stated to you at that time that we were coming in under Paragraph 3 of the Quit Claim Deed, which gave the Oakland Dock & Warehouse Company the right at that time to apply for removal of the clause, or modification of the clause; you recall that, do you not?

A. No, sir. I recall our discussion as to the use of the land, but I do not recall a discussion on the removal of the clause or a modification of the clause, because it doesn't appear to me now and I don't think it would have then that the clause need be removed [164] or modified so long as the construction that you placed on the land would not interfere with ship construction.

Q. Well, we didn't come to any agreement when you and I were discussing, did we?

A. That is correct.

Q. We were at opposite ends of the pole so far as agreement was concerned?

A. That is correct.

Q. Then it went back to Mr. Koehler's office and Mr. Harold Gros, who is now Chief Counsel for the Navy, went to the Counsel for the Bureau of Ships, Mr. Albert Stein, is that correct?

A. I know that Mr. Stein was called in on the subject, but as to the path the papers went, I'm not in a position to testify. I don't know who handled them, I do not know who handled them subsequent to the time of our discussion.

Q. Well, you were—do you recall that the Munitions Board referred this application for re-design-

(Testimony of Grover C. Klein.)

nation, I will call it, for a better word, or the modification of the Quit Claim Deed on the land to the National Security Resources Board, to Army, Navy and Air and to the Maritime Commission; do you recall that?

A. Would you please state your question again?

Q. Do you recall that the Munitions Board referred the affidavit, the application of Oakland Dock & Warehouse Company for re-designation of the terminal warehousing, the same re-designation that is referred to in Captain Christmas' letter to National [165] Security Resources Board?

A. No, sir, I do not recall that. I believe I stated that I have no knowledge of the discussions that went on preliminary to changing the Quit Claim Deed.

Q. Well, Admiral, you do recall that the Navy made a recommendation on these modifications to the Munitions Board, do you not?

A. No, I do not.

Q. I'm at—I have some inability to prove that, Your Honor, because these inter-departmental letters are not shown to people who made applications, so I thought maybe the Admiral might remember that. But do you know anything about a recommendation having been made by the Navy to the Munitions Board as to modifications of this Quit Claim Deed?

A. I believe I must have been away on a trip during that period of time, because I do not recall the preliminary discussions to this change in the

(Testimony of Grover C. Klein.)

Quit Claim Deed, and I was somewhat surprised when I saw the file, because had I been there I would have opposed it.

Q. Well, you did see the file?

A. I did see the file, that is correct.

Q. You saw the modifications?

A. I did see the modifications.

Q. And you would have opposed the modifications had you been present? [166]

A. I would have.

Q. Well, what would be the usual course or policy on a matter of this kind from the Munitions Board? It being Navy wouldn't it be referred to the Navy for report? [167]

Q. In the normal procedure you wouldn't act upon it until you received the Navy report, isn't that so?

A. Under normal procedure, yes, sir.

Q. So you would say under normal procedure the Navy finally made the report recommending these modifications, they would not have been included in the modified quit claim deed?

A. That I can't testify to.

Mr. Neblett: That is all from this witness, thank you, Admiral.

(Witness excused.)

RALPH G. DEEDE

recalled as a witness on behalf of the Defendant, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Neblett:

Q. Mr. Deede, does your department, the General Services Administration, execute a deed until—where the National Security Clause is involved and supposed to be involved will you execute a deed at any time until such time as you have received directions from the Department of Defense and Munitions Board as to the terms of that deed?

A. Well, I can't answer your question just like you have stated it.

Q. Well, tell us what you do? Maybe I framed the question rather imperfectly.

A. We are directed to sell certain facilities such as— [168] subject to the National Security Clause, and to obtain that, we get that direction on any particular plant and we do not have to have any further directions from Washington or anyone else to execute the deed.

Q. That helps me. Starting after you have sold a piece of property, such as the Oakland Dock and Warehouse Company, and given a quit claim deed and bill of sale which sets up certain provisions relating to the Security Clause, when that is done you never modify that or change it in any way unless you receive instructions, do you, from the

(Testimony of Ralph G. Deede.)

Department of Defense which comes through your Washington office, is that so?

A. That is correct; we can't modify anything in relation to the National Security Clause.

Q. You are familiar with this modification of that quit claim deed, are you not?

A. Yes, I have seen it. I don't recall everything that is in it, but I have seen it.

Q. You know it is executed by Mr. Bradford, here? A. That is correct.

Q. Here at 1000 Geary Street about 28 February, 1950? A. That is correct.

Q. And you do know that Mr. Bradford would never have signed that unless he had received something from the Munitions Board authorizing him to do so, is that so?

A. Well, we had received directions from the Washington office [169] which was in the form of a copy of instructions from the Munitions Board.

Q. Do you have those instructions in your file?

A. Yes, we have them. I don't know whether I have them here with me or not, but we have the copy of the instructions, yes. It was a mimeographed letter.

Q. It was a mimeographed letter telling you what would be put into the deed?

A. That is right.

Q. And you did put exactly what you got from the Munitions Board into the modified deed, is that so? A. Normally that is true, yes.

(Testimony of Ralph G. Deede.)

Q. I would like to see that if you have it, but I won't delay this matter.

Mr. Neblett: If Mr. Deede has that here I would like to have him produce it.

The Court: Yes, sir, you are entitled to produce it.

A. Do you want me to find it now?

Q. (By Mr. Neblett): Yes, if you would.

A. If you don't mind, if it doesn't matter, I would like to find it afterwards. I have a lot of files here and I don't know whether I will be in a position to put my finger on it.

The Court: Is that all you wanted to ask him?

Mr. Neblett: Yes.

The Court: Why doesn't he step down and find it and you [170] put another witness on?

Mr. Neblett: Very well.

A. Okay.

(Witness excused.)

Mr. Neblett: Mr. Arnaud.

HENRY J. ARNAUD

a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court?

A. Henry J. Arnaud.

Direct Examination

By Mr. Neblett:

Q. Mr. Arnaud, what is your position with the Oakland Dock and Warehouse Company?

A. Vice-president and manager of the yard.

Q. And you are also a director of the corporation? A. Correct.

Q. How long have you been vice-president and manager of the yard? A. About four months.

Q. And two or three months before that you were employed by the yard, were you not, employed by the company?

A. No, I wasn't employed until three or four months ago when I became vice—president-manager.

Q. You were in and around a lot in the yard for some months?

A. Oh, yes, I was in constant touch. [171]

Q. When did you come there? You were in Europe for a time. When did you come back from Europe?

A. August 27th, and I was in constant touch from there on.

Q. You were a stockholder in the company?

(Testimony of Henry J. Arnaud.)

A. Correct.

Q. Were you familiar with this modified quit claim deed? A. Somewhat, yes.

Q. You have read it, haven't you?

A. Yes, sir, I read it.

Q. Have you—has the company any plan for the development of terminal warehouses and so on, in connection with—no, has the company any plans to develop the company in the manner your contract or the quit claim deed gives you the right to develop it by the building of warehouses, refrigeration plants, machine shops, and so forth?

A. Yes, we have given it considerable study and we have prepared a brochure that we are ready to mail out which shows all the facilities and they are all designed around, I would say, warehouse facilities except for the machine shop, for that machine shop and machine shop dock, we have a little different plans for that.

Q. Your plans for the machine shop—what is your plan for the machine shop area?

A. Well, the machine shop and the entire block around it, we call it the machine shop block, which I could show you on the [172] brochure, we are now and have been negotiating with Lyco Company and associates for the last two or three months, a long term lease, and mainly they are in the course of, the ground around that block and neighboring buildings to the machine shop, they want to extend their operation. And they are taking over all the cranes in the building and crane ways and taking

(Testimony of Henry J. Arnaud.)

over the bulk, which they now have under temporary lease, bulk of the machines—I would say practically all the large machinery, and I would say the dollar value that would involve is at least three-quarters of the machinery or more. And the plans are to add two or three times that amount of machinery for their operations.

The Court: What are their operations?

A. Well now, they are manufacturing equipment for the Nordstrom Valve and doing a lot of work for them. In fact, their associates are Nordstrum Valve and Rockwell Industries. It hasn't been definitely negotiated yet. They are manufacturing these big valves shipped mainly to the Far East for the big oil lines. Now they are manufacturing parts for the cyclotron being constructed by the University of California. They use a lot of machinery.

Mr. Neblett: Lyco Company, on machinery, machine works, has a lease? A. Yes.

Q. That is a short term lease? [173]

A. Year's lease, and in that lease the major part of the machinery is involved. We can pick out machinery that they do not have any use for and that they release for us to sell, just the machinery that they consider obsolete for their operation. That is the only machinery we have put on our sales list for sale and have sold.

Q. It is proposed, this proposal you have there is to make a fifteen year lease?

(Testimony of Henry J. Arnaud.)

A. That is right.

Q. To Lyco Company and Associates, and that is a deal for a large block of ground, about how many acres?

A. It includes, I can just about tell you, something like 201 square feet of land and all the buildings, there are on it, which would be the machine shop building, machine side bay, and pipe shop, electric shop, and warehouse three. Those were adjoining buildings. Their plans are to take that over.

Q. Your plans to make a ground lease to Lyco Company that is being negotiated on that ground and buildings, and the machines to them for a fifteen year period? A. Yes.

Q. And then the negotiation was contemplated, as you said, adding three or four times as much machinery which is already there?

A. Yes. They are using some of the large drills and drill machine valves, and they need, to save time, a larger, multiple [174] drills, and they want—they contacted me last week. They are back in the East now. They contacted me before leaving about throwing in a large gas line because all the gas facilities in the yard were out of commission and can't be renewed. I settled that problem for them.

Q. Mr. Agostini is now in the east, in Washington, for the purpose of meeting these gentlemen?

A. Correct.

Q. Mr. Hardin is one of the mainsprings in the company, the attorney, Mr. Hardin?

(Testimony of Henry J. Arnaud.)

A. He is president of Lyco.

The Court: How do you spell that name?

A. L-y-e-o.

The Court: An eastern company, is it?

A. No, it is a local outfit made up of—I am not qualified to tell exactly the internal setup, but I will give you my information. It is made up mainly of local people. I don't know who the stockholders are, but I know Mark Hardin is president. Mark Hardin, he is an attorney in Oakland. And Fletcher is vice-president—or Lynch is vice-president and Fletcher Secretary-treasurer, I think and Mark Hardin in turn is attorney for Nordstrum Valve, and that is about all I know about that setup. The bulk of their work is Nordstrum Valve work. The picture is a few other things, I don't think I could really bring out. It might interfere with the deal. The picture is developing into a very large picture and we are hoping to make the deal.

Q. (By Mr. Neblett): What have you been informed the effect of this suit and this injunction has on your proposed deal?

A. Mr. Agostini told me that until this is settled nothing can be done. It has just thrown, I would say, a kibosh in the deal.

Q. Who is Agostini?

A. Jules is our President. I am Vice-president.

The Court: Of this company?

A. Of this company, Oakland Dock and Warehouse Company, yes.

(Testimony of Henry J. Arnaud.)

Q. (By Mr. Neblett): What are your plans for development of the rest of the property?

A. Well, we are negotiating on that Oakland ground, about 14 or 18 acres, which has not progressed along to the extent of this deal. We are progressing along a large warehouse facility deal which involves some three hundred thousand feet. Plans, temporarily, temporary drawings have been made on it.

Q. Can you build that warehouse with the crane ways and machinery in the yard as it now is?

A. I have seen houses that are built around oak trees, but I can't visualize a warehouse built around a crane. Well, on those cranes, if I can talk on that, most of the cranes can't be moved. They have settled to the extent that the tracks bulge in the middle; and we are using one now, only one, the one we landed that pier, and the other cranes, those Healy-Tibbetts Company that are laying these big 110 ton sections of pipe out at the estuary on the Oakland Sewer Disposal. When they first leased the facilities they worked in perfect condition, but after running across about one hundred such sections, and they have got a couple of hundred to go, the tracks start sinking in the pier. They first thought it was just a planking across that had deteriorated, and then they dug under that a little ways and timber—there are those sixteen by sixteen timbers and those are in the track and we realize they had to be changed, so we are in the process of changing them, which has been going on for over

(Testimony of Henry J. Arnaud.)

two months and still has roughly another month to go. However, some cases we found those caps that hold the timbers were deteriorated. The reason for it is this, they tell me. I am not qualified to talk intelligently on this. I am just relating what Mr. Healy Tibbetts told me.

Q. You talked to Mr. Healy Tibbetts?

A. Yes. They claimed the biggest difficulty with wharf facilities is this: When they constructed that number one, they put in green timber and they didn't creosote it. Number two they paved, put paving over the timber, over the docks, and probably the reason for that was that it was built there temporarily and they wanted to eliminate the risk of fire. I can't say. That has cracked. The water seeped under that [177] pavement and it is settled. On construction of permanent, they are never paved because the atmosphere absorbs it. That was the reason for that rotting of those timbers, rotted through and some actually broken. They are down there. While we are on that, I found the same condition on the tracks throughout the area.

Q. Are those crane tracks about thirty feet apart?

A. Thirty-two to thirty-five feet.

Q. Thirty-two to thirty-five feet between crane rails?

A. Yes.

Q. Six of them interlacing the property, isn't that right, or eight?

A. There are six crane ways, yes.

Mr. Neblett: I believe that is all. Cross-examine.

(Testimony of Henry J. Arnaud.)

Cross-Examination

By Mr. Peckham:

Q. Mr. Arnaud, isn't it a fact that you have a lease with Lyco Company of the premises that make up the machine shops of the Oakland yard?

A. Will you explain that a little more thoroughly?

Q. You have testified that Lyco Company occupies a certain portion of the premises over there——

A. That is right.

Q. At the Oakland yard? A. Correct.

Q. And I am asking you now, isn't it a fact that you have a [178] lease——

A. A one year lease.

Q. You have a one year lease with Lyco Company? A. Yes.

Q. Isn't it a fact that under the provisions of that lease the Lyco Company—with the Lyco Company, that you can remove the machine tools that are within the machine shops at any time that you sell those machine tools?

A. That is absolutely wrong. I will explain it to you. You go through the shop, and you can check with the Lyco people themselves, you will notice that on some machinery, on most of the machinery there is a red tag called "hold." All that machinery is incorporated under our lease, and this machinery, they have earmarked that. And then we have some shore machinery they have designated

(Testimony of Henry J. Arnaud.)

as taking up room and machinery they didn't need, but the bulk of it is marked for their use, and all the large pieces are marked like the Cincinnati planer and rolling mills and so forth.

Q. There is a considerable portion of the machine tools and machinery and equipment not a part of those Lyco premises that are leased over there, isn't that correct?

A. Well, there is the cranes I have just mentioned.

Q. And there were other small tools?

A. And other small tools.

Q. Referring to the machine tools that Lyco Company has removed [179] there, isn't it a fact they offered to buy those machine tools, just those machine tools they were removing for approximately \$360,000?

A. They haven't made us any offer at all. We haven't got to that point.

Q. Then there aren't any negotiations going on?

A. Yes, on the lease. We have made them a proposition on the lease but they haven't made us any offer on the machine tools.

Q. Isn't it a fact, Mr. Arnaud, that you have authorized—that you have sold and subsequently authorized Lyco Company to deliver machines located there in the premises of Lyco that they were using in production at the time?

A. No, you misunderstand. Here is the procedure we had with them. We only sold tools that they hadn't earmarked for their use, and they had

(Testimony of Henry J. Arnaud.)

nothing to do with the balance of the pieces. Yes, the operation was to maintain them, I will say. However, I haven't been strict with them using some of the tools while they were there because I felt something in use is a lot better than something not in use. But when the tools were sold, the only thing I gave them for their record, which they wanted and I thought they had coming, and we wanted too, to protect ourselves, because I will say I don't qualify as a tools man. I had to depend on them. When I sold a piece I didn't want somebody taking out something belonging to another piece, so at that time I would write a notice to them to the effect that [180] we sold tag number so-and-so to Mr. so-and-so or firm so-and-so and to let them take it, and I had my verbal instructions to be sure they wouldn't take any additional parts that might belong to some other piece of machinery.

Q. Isn't it a fact Lyco Company has objected to the removal of some of the equipment you have authorized to be delivered?

A. They haven't to me, and to my knowledge, to the firm, because they had first opportunity to pick out, and pick out at random whatever they wanted. It was their pieces. I have a list they submitted to me.

Q. Well, under the lease that you have with Lyco Company, Lyco Company—withdraw that question. Under the lease with Lyco Company does Lyco Company have the right to use all the ma-

(Testimony of Henry J. Arnaud.)

chinery or any of the machinery for the one year period?

A. No, they have to take in the lease certain pieces, but, as I said, I told them that other pieces that they are not using, certain pieces once in a while they have temporarily used, so I would let them use it.

Q. Well, in reference to the machinery designated in the lease, did they have the right to use the machinery for a year? A. They do, yes.

Q. And you cannot sell that machinery?

A. That is right. You can't lease a piece of machinery and sell it.

Q. Isn't it a fact in the brochure the Oakland Dock and [181] Warehouse Company has had prepared and circulated, that there is listed an official claim to the entire property that makes up the Oakland Dock and Warehouse yard?

Mr. Neblett: I object to that question on the ground that a brochure is there and we will be glad to produce it.

A. I have it in my brief case.

The Court: I think it is the best evidence.

A. Yes.

The Court: I would like to see it myself.

The Witness: May I go out and get it?

The Court: Yes.

(Thereupon the witness left the witness stand.)

(Testimony of Henry J. Arnaud.)

The Court: And I want to see this amendment to the quit claim deed. I have never seen that.

Mr. Peckham: I believe, your Honor, that is attached to the counter-affidavit of Mr. Agostini.

The Witness (Resuming witness stand): Your Honor, here it is (handing document to the Court).

Q. (By Mr. Peckham): I notice that the pages in the brochure which you have handed me, Mr. Arnaud are not numbered.

A. I think they are.

Q. Oh, yes, I beg your pardon; at the very left hand corner. Referring to page 7 of the brochure——

A. I don't have the copy. Pardon me.

Q. There are pictures shown of the machinery in the machine [182] shop?

A. That is correct.

Q. And doesn't it state——

Mr. Neblett: Pardon me, Counsel. Your Honor please, may I suggest that the brochure should be introduced in evidence before the witness testifies?

Mr. Peckham. Surely. I will introduce it for Identification.

The Court: Let it be marked.

(Brochure was marked Plaintiff's Exhibit 4 for Identification.)

Q. (By Mr. Peckham): Referring to page 7 of Plaintiff's Exhibit 4 for Identification, isn't it stated over the picture of the machines shown on page 7 that, "lathes, drill presses and other modern tool-

(Testimony of Henry J. Arnaud.)

making machines of various sizes and types are listed for sale"? A. That is correct.

Q. The picture there is a picture of the premises now occupied by Lyco Company?

A. That is correct.

Q. This picture in the corner, lower corner of page 7 on the left, is that a picture of the same facility or is it another?

A. That is correct, the same facility.

Q. That Lyco Company is now leasing?

A. Yes. [183]

The Court: Let me ask you, while it occurs to me, when you bought this from the Government there was an inventory, was there not?

A. Yes.

The Court: Of the machine tools and removable equipment?

A. That is right.

The Court: Now, could you point out on that inventory, or mark off on the inventory, how much of that equipment you proposed to lease to the Lyco Company in this fifteen year lease?

A. I don't know if Counsel has that, but so far as for sale I think I can, I can with Counsel. I can show you a list that we have offered for sale and all that equipment that is earmarked for Lyco here is not on that list. I will say that this brochure was in the process for about two or three months, and now at that time Lyco had earmarked this machinery.

The Court: Lyco is not given any right—it is

(Testimony of Henry J. Arnaud.)

not proposed in this fifteen year lease to give them any right to dispose of any machinery?

A. Naturally not.

The Court: You would have to replace it?

A. We haven't. The only thing, we are in the process on the general facts, price per square foot of the buildings, the terms of the lease and price per square foot of the outfit. We are at that point. I don't know what happened back east. [184] The dealings are being held up until we conclude here. It is unfortunate it had to come up at this very moment. We might have had the lease concluded.

Mr. Peckham: Isn't it a fact, Mr. Arnaud, that Lyco Company—it is only very remote, if any, possibility that Lyco Company intends to enter into a fifteen year lease?

A. I beg to differ with you. If I thought so I wouldn't have spent two months hard work accumulating the facts on that. If they did, I don't see why they are going back east. I don't see why they bring in the other names that I am not permitted to mention now.

Q. With whom did you discuss this proposed lease? With whom of the Lyco Company did you discuss this proposed lease?

A. Mr. Hardin, Mr. Lynch, and back east—well, they left the Friday that you served papers on us.

Q. You discussed it with them on that Friday?

A. That is right, and they were headed back that Saturday, Saturday morning I think they took the plane, and they are very disturbed about our diffi-

(Testimony of Henry J. Arnaud.)

culties here that does interfere with the possibility of making a lease. They had to lay considerable ground work back east.

Q. With the company?

A. No, interested people. I don't know if I am allowed to say. I don't know if it would be good business. If Counsel wants me to mention them, I will. [185]

Mr. Neblett: I didn't hear all of that.

A. Should I mention who they are going back to see?

Mr. Neblett: Just answer the questions, Mr. Arnaud, whatever they are. I will object if they are not proper.

The Court: Unless they are essential I won't require it.

A. It isn't the Government. It is people interested in a lease.

Q. (By Mr. Peckham): Now, Mr. Arnaud, there is located on the premises in the entire yard of the Oakland company considerable more machine tools than those that have been designated by Lyco Company to become part of the machinery that they would lease for fifteen years, isn't that correct?

A. I don't get your question clearly.

The Court: I didn't hear the answer.

A. I don't get the question clearly.

Mr. Peckham: Would you read the question, Mr. Reporter?

(Question read by the Reporter.)

(Testimony of Henry J. Arnaud.)

A. No, all they are entertaining in their deal now is the machines that they have within the premises they now occupy, all the bridge cranes and the bigger of the tools they have.

Q. You say the tool?

A. No, tools, which I said was the bulk of the machine shop.

Q. Bulk of the machine shop? A. Yes.

Q. Aren't there located on the premises in Oakland considerable [186] more machine tools and equipment that are not in the machine shop?

A. Cranes, mainly, is the biggest I can think of right now.

Q. There are other machine tools, aren't there?

A. No, except in the building appurtenant to these buildings we are taking over there are cranes that they are interested in and there is one lathe, I think, in one of the neighboring buildings—one lathe.

Q. Mr. Arnaud, you have plans to take down those cranes, do you not? A. No, we don't.

Q. Haven't you taken down one?

A. The Wurley crane is one.

Q. What is going to happen to that?

A. We sold that.

Q. It hasn't been delivered?

A. Yes. I will say it has been sold, paid for and delivered by the General Service.

Q. You found there——

The Court: What were the tools you sold the Moore Shipbuilding Company?

(Testimony of Henry J. Arnaud.)

A. We sold them some of the equipment not designated by Lyco for their use. If I remember right it involved a Blanchard—we have those records here—involved a Blanchard grinder, I think that they are—I forget the designation of the three [187] pieces but they are in the record. Counsel has a record here.

Q. (By Mr. Peckham): You are not prepared at this time, are you, Mr. Arnaud, to enumerate the specific machine tools that Lyco Company has designated?

A. No, but they have submitted a list to us.

Q. And that list is just a part of the negotiations, isn't that correct?

A. May I check my brief case? Sometimes I do carry things like that around. I have a list.

Mr. Peckham: Your Honor, if Counsel has no objection at this time I would move this be marked and admitted in Evidence.

The Court: Yes. I think he asked it be marked, too.

Mr. Peckham: For Evidence, not Identification.

(Document was marked Defendant's Exhibit O in Evidence.)

Q. (By Mr. Peckham): The list that has been proposed of machinery included in the *least* is just a list submitted for proposing the negotiations, isn't that correct?

A. The belief that they have what is included in that lease.

(Testimony of Henry J. Arnaud.)

Q. No, there are additional pieces they are taking over on the permanent *least*?

A. That is just the one year lease.

Q. Do you have a copy of the lease, Mr. Neblett, that the Lyco Company is presently holding the *premises of the premises*?

Mr. Neblett: Counsel, I don't have that, but I do have a copy of a list that was sent to me by Mr. Hardin in [188] Washington and I redrew it and made some changes in it. That is all I have. I don't know whether the witness has the Lyco lease with him here today. [188-A]

The Witness: No, I don't have it.

Mr. Peckham: I was interested in the provisions relating to machinery.

A. The lease that you read is the lease that you signed, that I haven't signed so if that is——

The Court: I would like to see a list of the machinery that is going to the Lyco under the proposed lease.

Mr. Neblett: The proposed lease, your Honor, that has not yet been fixed upon, the terms are not yet completely agreed upon.

The Witness: Slightly mixed up now.

The Court: Well, we could have a list of the property that is not heretofore leased, not under the lease to Lyco now. Would that be difficult to get?

The Witness: Well, we have that——

The Court: And also a list of that which has already been sold.

(Testimony of Henry J. Arnaud.)

Mr. Neblett: The list of property already sold appears under releases of the chattel mortgages. But that is described largely by folder numbers which is the description on the chattel mortgage.

The Court: Yes.

Mr. Neblett: The War Assets, the General Services has a complete list of everything that has been sold, of course. We have to go to their files to get it. [189]

Mr. Peckham: Perhaps, your Honor, we could have Counsel—Counsel and I could work out that with Mr. Deede by referring back to the folders and take it down, specific possession, and make a list. Perhaps we can stipulate to, agree to a statement of fact as to that matter.

The Court: You see, in this chattel mortgage—I mean, the bill of sale, the provision in here to the effect that they will not sell or dispose of any of the machines, tools or other things, the loss of which would materially reduce the capacity of the plant to produce the items for which it is designed. Now, I have no—I can't tell what has been removed, sold, whether it is essential or not.

Mr. Neblett: If your Honor please, that question—I don't know how to meet that question, except in argument. We propose to meet that question by showing that the modified quit claim deed took out all reservations of the dormant estate of the personal property and if that quit claim deed had been plead in the Complaint, it could have no cause of action stated. That is the point in the case.

(Testimony of Henry J. Arnaud.)

Of course, I don't waive any other points we have made. We think it is invalid anyway, but the transaction which was made with the Government was made with its eyes open and now, instead of our breaching our agreement, the Government is breaching the agreement which it made with us on February 28.

The Court: Leaving that aside, I have heard enough on that, but here is the situation that the Government charges [190] that you're selling property, going to sell a lot of this equipment which was mentioned in this bill of sale. The restriction on the sale is limited to that which will reduce the capacity of the plant to produce the items for which it was designed.

Now, for instance, a man might go sell an obsolete turret lathe that wouldn't reduce the capacity a bit. But on the other hand to sell these cranes might reduce the capacity considerably, but whether these sales reduce the capacity or not, I don't know.

Counsel, the witnesses yesterday said, of course, it would take a great deal of time to rehabilitate this plant in the event these machine tools were sold, but they didn't say, I think they are probably right, I think there is a lag in the machine tool market, but doesn't reach the question of whether, what has been done or is contemplated, is going to reduce the capacity of the plant.

Mr. Peckham: Your Honor, I have a partial list of the specific pieces of machine tools that have been sold to the Moore Dry Dock Company. This

(Testimony of Henry J. Arnaud.)

purports only to be a partial list, just one seller, Mr. Arnaud will admit they sold a turret lathe.

The Court: Not passing on the question you just touched your finger on here, whether or not the provisions of the amended deed, quit claim deed read together with this bill of [191] sale changed the terms of the bill of sale. I am not discussing that now, just trying to get what the facts are.

Mr. Neblett: Your Honor please, on this question of the machine tools and machinery just sold, we have given to Mr. Rawleigh, the representative of the Navy, who called upon us, a list of these machines. The way they are described in the chattel mortgage, the way they were discussed in the leases, by folder numbers, and they are available at the War Assets. We don't have these folder numbers. That, I think that Counsel could produce that very easily by asking the War Assets to bring down that list. Now, we do have the inventory of the entire property, which we could go through and it would take a long time to get it all.

The Court: Of course, they could produce the list of what you propose to sell. You sold some things. They can't produce a list of that, perhaps, but what you propose to sell, you will have to produce yourselves and what you propose to lease to Lyco, and I think there should be some testimony here in regard to, if that is—in regard to whether or not those things that are sold and proposed to be sold will deplete—what is the language?

(Testimony of Henry J. Arnaud.)

Mr. Peckham: Materially reduce.

The Court: Reduce the capacity to produce. I think it is somewhat incumbent upon both parties to give me an idea. I wouldn't want to enter an injunction in this case just [192] because you proposed to sell something obsolete, worn out material, that wouldn't reduce this thing.

On the other hand, if I felt that the conditions required, I might enter, entertain giving an injunction, if the place was going to be stripped, unless I had no right to, you see. But that seems to me to be quite a vital point in the consideration of this matter.

Mr. Peckham: Well, your Honor, we could, from our view point, as far as furnishing a list is concerned, would be to translate the folder numbers on the releases of the chattel mortgage that we assume, though we don't actually have actual knowledge, we assume have been sold, and get specific descriptions and compile that list. Of course, as far as we can attempt to introduce further testimony, that once that list is determined, from the Admiral and perhaps other representatives as to how that would affect the capacity of the plant to produce, I think that could be done rather quickly, but it would take a little time, not too much time, to compile that list.

Mr. Neblett: May I make a suggestion, your Honor? I just spoke to Mr. Horton, who is the associate with Lester, Herrick & Herrick, who are

(Testimony of Henry J. Arnaud.)

now making an audit of the books of the concern. The audit has been brought down to May 31st of this year. The audit is about completed. Mr. Horton has a list, item by item of everything sold and everything left [193] in the yard. It isn't here, it is in his office. Mr. Horton, where is it?

Mr. Horton: I have a list of the property sold in my office.

Mr. Neblett: At your office?

Mr. Horton: My office.

The Court: Could you bring it back at 2:00 o'clock?

Mr. Neblett: Very well.

The Court: Well, proceed. Excuse the interruption.

Mr. Neblett: This, your Honor, I have in my hands the inventory furnished by the War Assets Administration. You can see what a voluminous document it is.

The Court: You wouldn't contend, Mr. Peckham, would you, that that if they are allowed to lease, to make a lease to Lyco, as long as it doesn't include the disposal or allow Lyco to dispose of it——

Mr. Peckham: I haven't read over the Security Clause provisions with the thought in mind of whether a lease or the leasing——

The Court: Any lease that they make.

Mr. Peckham: Would have to include the same terms?

The Court: Would be subject to the——

Mr. Peckham: Yes.

(Testimony of Henry J. Arnaud.)

The Court: —terms of the bill of sale—

Mr. Peckham: Yes. [194]

The Court: —whatever they may be modified by the amended deed, subject to that modification.

Mr. Peckham: Yes.

The Court: I wouldn't want to restrain these people if they were just—from making a lease with Lyco if that is not going to—if it consists of disposal or violates any Government policy, Lyco can operate and turn the things over to the Government when they want it in case of an emergency, just as well as these people.

Mr. Peckham: I think we can produce considerable evidence on that prospective lease that will put a different light on the picture.

Mr. Neblett: It doesn't appear on the records, your Honor, that Lyco had been in the property under the lease to War Assets Administration, from War Assets Administration for a year or two before this company bought it, and when Lyco went in the Government assigned that lease to us when we bought it. The Government assigned that lease to us. They were already there. We were inheriting them as a tenant.

Mr. Peckham: Of course, the situation as it actually stands at this moment is there is no lease with Lyco Company on a long term proposition.

The Court: That is right, that is a temporary lease.

Mr. Peckham: But there has been a great deal of machinery sold out of that shop. We can show

(Testimony of Henry J. Arnaud.)

that Lyco Company—well, [195] I would rather wait to produce that testimony.

The Court: Yes.

Mr. Peckham: I think in view of your Honor's statements that such a list of the property should be compiled by us and should produce further evidence on the question of the sale of that machinery, the sale of prospective machinery, would affect the capacity of the plant to produce——

The Court: Well, let Mr. Neblett go on with his case, now. You finished?

Mr. Neblett: Just one more question.

Q. Does that brochure which has just been introduced in Evidence, does that give the plan of the Company for the development of the property under the modified quit claim deed?

A. Yes, it does.

Q. And that brochure is intended to be, it is an advertisement to the public for the purpose of encouraging——

A. That is right, because you see there is possible one proposed building on an area that under the new quit claim deed we can build and where the Government, for instance, would have to, if they took over, they would have to tear it down and rehabilitate it, and paying us a fair value during the time that they are occupying the premises, paying us something for damages and work in progress and a few other things. That is all designed around that proposition, wasn't started until the new quit claim—yes, it had been started before, but it [196]

(Testimony of Henry J. Arnaud.)

wasn't finished, it was kept in abeyance until this new quit claim deed was made of record.

The Court: Briefly, what is that quit claim deed, what is contemplated under that quit claim deed, putting a warehouse in there?

The Witness: On that particular problem, on the legal problem, it wouldn't be possible——

The Court: You don't know that?

The Witness: No.

The Court: What do you contemplate doing you say comes under the quit claim deed, the amended quit claim deed?

The Witness: Well, for instance under the old deed, if I remember the terms, you couldn't bring in a tenant and tell them, here, we will lease you this property good for fifteen years, build a building for you or you build a building, and where the old lease, come in for a short time—now, the quit claim deed gives absolute right to anything we want on the premises, practically. That is the way I see it. Build a ten story building out on that open ground, we don't have to ask anybody for any permission, and in case of an emergency, that the Government comes in and takes over. If they don't want those premises, that building we built on that property, they are to tear it down and rebuild it. After and during that time they are to pay us a fair market value for the improvements we have plus the loss of work in progress. The [197] way I look at it, I look at it this way: Suppose we didn't have any Security Clause on the property itself. We would

(Testimony of Henry J. Arnaud.)

be then in the same light as the Contra Costa—I mean the San Francisco, the big laundry, the United States Laundry here in San Francisco, an office building or a hotel building, if the Government wants under the eminent domain, they can take it over anyway, so we feel the quit claim deed now practically gives the same proposition, offer them to the tenant. They are practically the same regulations as under the eminent domain; in case of war the Government could have it, they are going to have it.

The Court: They are protected.

The Witness: They are protected. And can't be thrown out of here.

The Court: The United States can always condemn anything.

The Witness: That is right.

Recross-Examination

By Mr. Peckham:

Q. Were you with this company at the time this land was acquired by the Oakland Dock and Warehouse Company? A. Correct.

Q. That was in June, 1949? A. Yes.

Q. And you knew that both the personal property and the real property were subject to the National Security Clause?

A. I will say this, Counsel: I will say that I left on June [198] first and all of the papers were transacted after that, and I was away three months.

(Testimony of Henry J. Arnaud.)

Q. Did you ever hear in any of the discussions concerning the purchase of that property about the National Security Clause? A. Yes.

Q. Did you understand the main effect and implications that that clause would be imposing upon that property?

A. Well, I certainly—I must have a different version on it than you have.

Q. You knew——

A. I knew that we couldn't do exactly what we wanted to, but I never did think we would be restricted to the extent you think we are.

The Court: Well, gentlemen, the Grand Jury is waiting to report here. It is 12:00 o'clock now. I have an appointment, luncheon appointment, and it might be a little late. Suppose we adjourn this hearing until 2:30.

Mr. Peckham: Very well, your Honor.

(Thereupon an adjournment was had until 2:30 o'clock p.m. of the same day.) [199]

Wednesday, June 21, 1950—2:30 o'Clock p.m.

HENRY J. ARNAUD

having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Neblett: If the Court please, at the recess this morning the question arose as to the lease between the Lyco Machine Company and the Oakland Dock and Warehouse Company, of the machine

(Testimony of Henry J. Arnaud.)

shop. I have the original copy of the lease which I will make available to Counsel.

The Court: That is the one year lease?

Mr. Neblett: Yes, your Honor. That is the lease that succeeded to the lease for one year which Lyco had for some years, I don't remember just how long.

The Court: I don't think it appears in the testimony or the record, but Mr. Neblett indicated this morning that at the time you got this property, you bought it with the existing lease to Lyco?

The Witness: With the Government.

The Court: Of the machinery?

A. That is right.

The Court: And the lease, this lease that has been offered in evidence, is a renewal of that lease?

A. Yes. That expired in April.

Mr. Neblett: There are some other, different terms, [200] your Honor.

The Court: What?

Mr. Neblett: There are some different terms, increased rental and some other features.

The Court: However, it is in a sense an extension of the former lease?

Mr. Neblett: Yes.

A. And the permanent lease now to which the negotiations——

Mr. Peckham: I won't try to read it now, your Honor.

The Court: Will the witness identify it as the temporary lease then so we will have it in the record correctly?

(Testimony of Henry J. Arnaud.)

Recross-Examination

(Continued)

By Mr. Peckham:

Q. I show you a document entitled "Agreement of Lease," dated May 1, 1950, between Oakland Dock and Warehouse Company, as lessor, and Lyco Machine Works as lessee, and will ask you if you identify this document?

A. Yes, that is the temporary lease. I recognize all signatures on it.

Q. You recognize the signatures of Jules J. Agostini, Jr.;—

Mr. Neblett: May I ask Counsel and the witness to raise their voices? I have great difficulty in hearing either of them.

Q. (By Mr. Peckham): You recognize the signature of Mr. Agostini and Mrs. Morgan as President and Secretary, respectively, of the lessor company, and Laurence Fletcher as Secretary [201] of the lessee? A. I don't recognize—

Mr. Neblett: We will stipulate these are their signatures.

A. I recognize Mark Hardin's signature.

Mr. Peckham: At this time do you wish to offer it in *office*, Mr. Neblett?

Mr. Neblett: No, that is the only copy we have. If you desire to offer it in evidence we are perfectly willing to let you do so.

The Court: Can't you do this, offer it in Evi-

(Testimony of Henry J. Arnaud.)

dence but don't mark it, and then replace it with a photostatic copy or just a typewritten copy?

Mr. Neblett: May I suggest, your Honor, that it be received in Evidence but not marked and that the Reporter copy it in full in the transcript?

The Court: All right, just the same thing.

Mr. Neblett: And the Reporter can return this lease to us when it has been fully copied with our daily copy of the transcript.

The Court: Yes.

Mr. Peckham: Yes.

Defendant's Exhibit next in order?

The Court: It is your exhibit.

Mr. Neblett: Very well, your Honor. [202]

Agreement of Lease

This Lease made and entered into this 1st day of May, 1950, between Oakland Dock and Warehouse Co., a corporation organized and existing under the laws of the State of California, hereinafter called Lessor, and Lyco Machine Works, a corporation organized and existing under the laws of the State of California, hereinafter called Lessee:

Witnesseth

Lessor hereby leases to Lessee, and Lessee does hereby hire from Lessor, a certain building known and described as Building No. 59, otherwise known as the Machine Shop, which building is located on the property of Lessor, formerly known as Moore Drydock Company, West Yard, Oakland, California,

(Testimony of Henry J. Arnaud.)

together with certain machinery, tools and equipment contained therein and the appurtenances to the machinery, tools and equipment, which machinery, tools and equipment are more particularly described as follows, to wit:

- 1 Oliver Drill Pointer
- 1 Willeys Grinder for Carbide
- 1 Cincinnati Cutter Grinder
- 1 Morton 18" Surface Grinder with AC-DC motor for magnetic check
- 1 Mitts and Merrill Key Seater—small
- 3 Pedestal Grinder [203]
- 1 Racine Hydraulic Shear Cut Saw
- 2 Racine Oil Cut Saw
- 1 Carlton 8' Radial Drill Press
- 1 Carlton 6' Radial Drill Press
- 1 Cincinnati 3' Radial Drill
- 1 Canedy Otto 21" Drill Press
- 1 Canedy Otto Bench Drill Press
- 1 Hydraulic 75-ton Press
- 1 Fameo Arbor Press
- 1 Electric Welding Machine
- 2 Bullard Vertical Turret Lathe
- 60" King Boring Mill
- 72" King Boring Mill
- B. & L. Horizontal Boring Mill
- 5" Spindle Table Model
- Lucas Horizontal Boring Mill
- G. & L. Horizontal Floor Mill 6" Spindle
- 1 48" LeBlond Lathe

(Testimony of Henry J. Arnaud.)

- 2 36" Niles Lathes
- 2 Monarch 20" Lathes
- 1 American 20" Lathe
- 1 Monarch 16" Toll Room Lathe
- 1 G. & E. 20" Shaper
- 1 Smith and Mills 25" Shaper
- 2 Cincinnati #4 Universal Milling Machines
with attachments
- 1 Cincinnati Hypor Planer—Open Side

This Lease is made upon the following terms and conditions:

1. The term of this lease shall be a period of one year, commencing on the 1st day of May, 1950, and ending on the 30th day of April, 1951; provided, however, that this lease shall be cancellable upon a four months' notice of cancellation in writing given by either party to the other prior to the commencement of any monthly term thereof.

2. Lessee shall pay to Lessor as rental for the above-described building, machinery, tools and equipment, the sum of \$1,850.00 per month and, in addition thereto, the sum of \$20.00 per month for water furnished said building, both sums to be in lawful money of the United States of America, as follows: \$1,870.00 on and in consideration of the execution hereof, receipt of which is hereby acknowledged, and \$1,870.00 on the 1st day of June, 1950, and \$1,870.00 on the 1st day of each and every month thereafter during the existence of this lease.

(Testimony of Henry J. Arnaud.)

3. Lessee agrees to pay said rental at the time, in the amount and manner herein provided and to do, perform and meet each and every covenant, condition and obligation contained herein. [205]

4. If Lessee holds possession hereunder after the expiration of the term of this lease with consent of Lessor, Lessee shall become a tenant from month to month at the monthly rental of \$1,870.00, payable in advance, on the 1st day of each and every month, and upon all of the terms and conditions herein specified.

5. Lessor and the agents and employees of Lessor shall have the right to enter in and upon said building at all reasonable times to inspect the same in order to see that no damage has been, or is being done to the leased property, and to protect any and all rights of Lessor and to post such reasonable notices as Lessor may desire to protect the rights of the Lessor; and Lessor shall have free access to the building for the purpose of showing, removing or otherwise disposing of the machinery, tools and equipment on the premises not specifically leased herein, and for the further purpose of showing the leased property.

6. Lessee accepts the building as it is now and agrees that the building is now in tenantable and good condition and that Lessee shall, at Lessee's cost, keep said building both inside and out in good condition and repair during the term, and that the building shall not be altered, repaired or changed

(Testimony of Henry J. Arnaud.)

without the prior written consent of Lessor. Lessee agrees at the expiration [206] of the term of this lease, or upon the earlier termination thereof for any reason, to quit and surrender said building in good condition and repair, reasonable wear and tear and damage by acts of God or fire excepted. Lessee hereby waives the provisions of Sections 1941 and 1942 of the Civil Code of the State of California and any and all other statutes or laws permitting a tenant to make repairs at the expense of a landlord or to terminate a lease by reason of the condition of the building.

Lessee also accepts the machinery, tools and equipment leased herein in the condition in which they are and each of them is; and Lessee agrees that it has inspected all of them and that they are all in good working order and condition.

7. Lessee shall not assign this lease, nor any right hereunder nor sublet the building, machinery, tools and equipment, nor any part thereof, without the prior written consent of Lessor. No consent to any assignment of this lease, or any subletting of said property, shall constitute a waiver or discharge of the provisions of this paragraph, except as to the specific instance covered thereby; nor shall this lease or any interest therein be assignable by action of law including bankruptcy, both involuntary and voluntary, and no Trustee, Sheriff, [207] Creditor or Purchaser at any judicial sale or any officer of any Court acquire any right under this lease, or to

(Testimony of Henry J. Arnaud.)

the possession or use of the premises, or any part thereof, without the prior written consent of Lessor. Any violation of the terms of this paragraph shall, at the option of Lessor, be deemed a breach of this lease.

8. Lessee agrees that if Lessor is involuntarily made a part defendant to any litigation concerning this lease, or the leased property or any part thereof, by reason of any act or omission of Lessee and not because of any act or omission of Lessor, then Lessee shall hold harmless the Lessor from all liability by reason thereof including reasonable attorneys' fees incurred by Lessor in such litigation and all taxable court costs and, in case Lessor brings an action against Lessee to enforce any of the terms hereof, or commences a summary action under the Unlawful Detainer Act of the State of California for the forfeiture of this lease and the possession of said property, or any of them, and Lessor shall prevail in such action, Lessee agrees to pay to Lessor such attorneys' fees and expenses as the Court may deem reasonable, and the right to such attorneys' fees and expenses shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment and, if prosecuted to judgment, [208] such fees shall be included in said judgment.

This lease is made upon the express condition that if default be made in the payment of the rent above

(Testimony of Henry J. Arnaud.)

reserved, or any part thereof, or if Lessee fails or neglects to perform, meet or observe any of Lessee's obligations hereunder, or if Lessee shall abandon or vacate said property, Lessor, or the legal representative of Lessor, at any time thereafter may, in the event such default is not remedied by Lessee within thirty (30) days after notice in writing from Lessor, lawfully declare said term ended and re-enter said leased property, or any part thereof, either with or without process of law, and expel, remove and put out Lessee or any person or persons occupying said property, and may remove all personal property therefrom, using such force as may be necessary to repossess again and enjoy said property as it did before this lease, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant or condition, and without liability to any person for damages sustained by reason of such removal.

Lessor may likewise at Lessor's option and in addition to any other remedies which Lessor may have upon such default, failure or neglect and upon entry therefor repair, alter and change the leased property as Lessor may deem fit and let the property, or any part thereof, [209] from time to time at any rental and on any terms and for any part or all of the balance of the term hereof that Lessor may deem desirable in Lessor's discretion; and Lessor may in said letting also let the said property for a period extending beyond the expiration of the term hereof, which shall not prejudice or invalidate any

(Testimony of Henry J. Arnaud.)

of Lessor's rights in this lease reserved, but the period beyond the term hereof shall in no event be for the installments of rent and other sums falling due hereunder for the period or periods after entry during which the property remains idle, which sums shall be payable as they become due hereunder; (b) for all expenses, including commission, which may be incurred by Lessor from time to time during the term hereof for reletting said property, which expenses shall be payable as they are incurred; and (c) while said property is subject to any lease or leases made by Lessor pursuant to this paragraph, for the amounts by which the monthly installments payable under such new lease or leases is less than the monthly installments of rent payable hereunder, which deficiency shall be payable monthly as the same is determined. If the Lessor, either before or after such entry, elects to exercise the right given it by the next [210] succeeding paragraph to accelerate the unpaid amount of rent, it shall at any time after such entry have the election to recover in lieu of the amounts which would thereafter be payable under the preceding sentence of this paragraph, the amount by which the rental value of the portion of said term unexpired at the time of such election is less than the entire amount of unpaid rent payable hereunder for said unexpired portion of said term, which deficiency and any expenses, including commissions, incurred by Lessor in leasing the said

(Testimony of Henry J. Arnaud.)

premises shall be due to and recoverable by the Lessor at the time it exercises the said election notwithstanding that the full term hereof shall not have expired; and if the Lessor after such entry leases said property, then the rent payable under such lease shall be conclusive evidence of the rental value of the said unexpired portion of the said term.

Lessor may likewise at Lessor's option and in addition to any other remedies which Lessor may have upon such default, failure or neglect, give to Lessee written notice of such default, failure or neglect and advise Lessee thereby that, unless all the terms covenants and conditions of this lease are fully complied with within thirty (30) days after the giving of said notice, the entire amount of rent herein reserved or agreed [211] to be paid and then remaining unpaid shall immediately become due and payable upon the expiration of said thirty (30) days and, unless all the terms, covenants and conditions of this lease are fully complied with by Lessee within said thirty (30) days, the whole of said rent shall immediately become due and payable upon the expiration of said thirty (30) days without further notice to Lessee.

9. The subsequent acceptance of rent hereunder by Lessor shall not be deemed a waiver of any preceding breach or any obligation hereunder by Lessee other than the failure to pay the particular rental so accepted: and the waiver of any breach of any

(Testimony of Henry J. Arnaud.)

covenant or condition by Lessor shall not constitute a waiver of any other breach regardless of knowledge thereof.

10. Lessee agrees to pay for all fuel, gas, oil, heat, electricity, power, materials and services which may be furnished to or used in or about said property during the term of this lease and to keep the same free and clear of any lien or encumbrance of any kind whatsoever created by Lessee's acts or omissions.

11. Any notice, demand or communication under or in connection with this lease may be served upon Lessor by personal service, or by mailing the same by Registered Mail in the United States Post Office, postage prepaid [212] thereon, and directed to Lessor at Latham Square Building, Oakland, California, and may likewise be served on Lessee by personal service or by so mailing the same addressed to Lessee at 925 Central Bank Building, Oakland, California. Either party hereto may change such address by notifying the other party in writing as to such new address as Lessee or Lessor may desire used and which shall continue as the address until further written notice.

12. If the building in which the herein leased property is situate shall be damaged or destroyed by fire, the Lessee shall give immediate notice thereof to the Lessor and the Lessor shall forthwith repair the same, provided such repairs can be made within thirty (30) days by working in the usual and

(Testimony of Henry J. Arnaud.)

ordinary manner and under the laws and regulations of State, County or Municipal authorities, but such destruction or damage shall in nowise annul or void this lease, except that the Lessee shall be entitled to a proportionate deduction of rent while such repairs are being made, such proportionate deduction to be based upon the extent to which the making of such repairs shall interfere with the business carried on by Lessee on said property. If such repairs cannot be made in said manner in thirty (30) days, the Lessor may, at his option, make same [213] within a reasonable time, this lease continuing in full force and effect, but the Lessee shall be entitled to a proportionate deduction of rent while such repairs are being made as hereinabove provided. In the event that the Lessor does not so elect to make such repairs which cannot be made in said manner in thirty (30) days, or such repairs cannot be made under such laws and regulations this lease may be terminated at the option of either party.

13. The exercise of any right or option or privilege hereunder by Lessor shall not exclude Lessor from exercising any and all other rights, privileges and options hereunder and Lessor's failure to exercise any right, option or privilege hereunder shall not be deemed a waiver of said right, option or privilege nor shall it relieve Lessee from Lessee's obligation to perform each and every covenant and condition on Lessee's part to be performed hereunder nor from damages or other remedy for failure to perform or meet the obligations of this lease.

(Testimony of Henry J. Arnaud.)

14. The covenants and agreements contained in this lease shall be binding upon the parties hereto and upon their respective heirs, executors, administrators, successors and assigns.

15. Time is of the essence of this lease and of each and every of the provisions herein contained.

16. If any part of the leased property shall be taken or condemned for a public or quasi-public use, and a part thereof remains which is susceptible of occupation hereunder this lease shall, as to the part so taken, terminate as of the date title shall vest in the condemnor and the rent payable hereunder shall be adjusted so that the Lessee shall be required to pay for the remainder of the term only such portion of such rent as the value of the part remaining after taking or condemnation bears to the value of the entire property at the date of taking or condemnation; but in such event, Lessor shall have the option to terminate this lease as of the date when title to the part so condemned vests in the condemnor. If all of the leased property or such part thereof be taken or condemned so that there does not remain a portion susceptible for occupation hereunder, this lease shall thereupon terminate. If a part or all of the leased property be taken or condemned, all compensation awarded upon such condemnation or taking shall go to the Lessor and the Lessee shall have no claim thereto, and the Lessee hereby irrevocably assigns and transfers to the Lessor any right to compensation or damages to which

(Testimony of Henry J. Arnaud.)

the Lessee may become entitled during the term hereof by reason of the condemnation of all or a part of the leased property. [215]

17. Lessee shall have the right to install such of its own machinery and equipment upon the herein leased property as may be necessary for its operations and to remove same at the end of the term hereof, provided, however, that following such removal the Lessee shall, at the option of Lessor, at its sole expense, restore the properties leased to the same condition as when they were delivered to Lessee pursuant to this lease.

18. Lessee shall use expert care in the occupation, use and operation of the building, equipment and machinery embraced in this lease and shall at all times during the term of this lease keep and maintain the same in a good state of repair, and shall, at Lessee's expense, make all repairs and perform all maintenance necessary to keep the building, equipment and machinery at all times in good condition as at the beginning of the term of this lease. Such necessary maintenance shall include the greasing, oiling, and turning over of all heavy equipment in the Machine Shop, not specifically leased by Lessee but which is situated in said building, at least once every two weeks in order that such heavy equipment may be maintained in good operating condition. Upon the expiration or termination of this lease, Lessee shall forthwith yield and place Lessor in peaceful possession of the building, equip-

(Testimony of Henry J. Arnaud.)

ment and machinery embraced in this lease, free and clear of any liens, claims or encumbrances and in as [216] good condition as said building, equipment and machinery existed at the commencement of this lease, ordinary wear and tear excepted.

19. During the term of this lease, Lessor will procure and maintain, at the cost of the Lessee, Insurance on the equipment and machinery embraced in this lease against fire, windstorm and such other hazards in such companies and in such amounts as shall be mutually agreed upon between Lessor and Lessee; but the amount of such insurance shall not be less than \$368,000.00. The policies evidencing such insurance shall be made payable to Oakland Dock and Warehouse Co. The premiums shall be paid by Lessor and the Lessee shall reimburse Lessor within thirty days from the date Lessor renders a statement to Lessee of the amount of the premiums. In the event of partial loss payable under any of the policies, the proceeds shall be applied by Lessor to the repair, restoration or replacement of the property as damaged or destroyed; provided, however, that in the event it is determined that the cost of repair, restoration or replacement will exceed the amount of the insurance proceeds Lessor may elect whether or not to apply such proceeds as aforesaid. Any property acquired in replacement of the property damaged or destroyed shall be the property of Lessor and shall thereupon be subject to all the terms [217] and provisions of this lease. In the

(Testimony of Henry J. Arnaud.)

event Lessor determines that the cost of repairs, restoration or replacement of a partial loss will exceed the amount of insurance proceeds, or the equipment and machinery are so damaged or destroyed as to render said property totally unusable by Lessee, and Lessor does not elect to apply the insurance proceeds to the repair, restoration or replacement thereof, as above set forth, Lessor will so advise Lessee in writing and this lease may thereafter be terminated by either party upon thirty (30) days' written notice to the other party.

Lessee also agrees to save Lessor harmless against any liability whatsoever because of accident or injury to persons or property occurring in the use or operation of the building, equipment and machinery embraced in this lease. Lessee further agrees that during the term of this lease it will procure and maintain at its cost public liability insurance and property damage insurance in such amounts and with such companies as Lessor shall approve or require. The policies evidencing such insurance shall be made payable to the Oakland Dock and Warehouse Co. for the account of all interests and such policies or copies thereof shall be delivered to Lessor.

20. In the conduct of its operations upon the property embraced in this lease, Lessee agrees to comply [218] with all applicable Federal, State, Municipal and Local Laws, and the rules, orders regulations and requirements of any commissions,

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departments and bureaus, and all local ordinances and regulations; and further agrees to indemnify and hold Lessor harmless from any liability or penalty which may be imposed by Federal, State, Municipal or Local Authority, or any commission, department or bureau thereof by reason of any asserted violation by Lessee of such laws, rules, orders, ordinances, regulations or requirements; provided, however, that nothing herein contained shall prohibit Lessee from contesting in good faith the validity of any such laws, rules, orders, ordinances or regulations.

21. It is agreed between the Lessor and the Lessee that this lease terminates and cancels as of May 1, 1950, all other leases and contracts between Lessor and Lessee on Building No. 59 and on any or all of the machinery, tools and equipment therein, and that any subsequent modification of the terms or conditions of this lease shall be void unless reduced to writing and signed by both parties hereto. The Lessee shall have the normal rights of ingress and egress to the leased property over the rail and street connections therewith which lie on Lessor's property, but there shall be no obligation upon the part of Lessor to keep said railroad and street [219] connections in repair.

In Witness Whereof, the said parties hereto have subscribed their names and affixed their seals, in

(Testimony of Henry J. Arnaud.)

duplicate, the day and year first hereinabove written.

OAKLAND DOCK AND

WAREHOUSE CO.,

A California Corporation,

By /s/ JULES J. AGOSTINI, JR.,

President.

Attest:

By /s/ A. HANFORD MORGAN,

Secretary.

Lessor.

LYCO MACHINE WORKS,

A California Corporation,

By /s/ J. M. HARDIN,

President.

Attest:

By /s/ LAURENCE S. FLETCHER,

Secretary,

Lessee.

Q. By Mr. Peckham: Mr. Arnaud——

Well, first I will show Counsel this document.

Mr. Neblett: What is it, Mr. Peckham, if I may ask?

Mr. Peckham: I understand this is a circular that was circulated among prospective purchasers of machine tools showing [220] a list of the machine tools at the Oakland Dock and Warehouse Company that it stated to be for sale.

A. I recognize that.

(Testimony of Henry J. Arnaud.)

Mr. Neblett: I don't recognize it, but if the witness can identify it. A. Yes.

Q. (By Mr. Peckham): I show you a document, multigraphed pages, several multigraphed pages, and ask you if you can identify that document?

A. Yes, we have that. I set this up and, in fact, we have printed forms of this type. We were making that out and we started to mimeograph it, about the first seventy-five to one hundred, and we have printed forms. This is the list of machinery excluding the machinery that is earmarked for Lyco that we offered for sale, and I didn't do this until Counsel, Colonel Neblett, advised me that I had a right to sell everything on the yard according to the quit claim deed, and this was done subsequent to that. He advised me I had a right to sell everything in the yard. However, the Lyco Machine Tools, that was at that time, told me that lease is excluded from. You will notice these numbers, how they jump. We had them all numbered. There is one, two, three, five, eight, twelve. All the in between numbers, I would say now in the machine shop, we can tell are all numbers, pieces of equipment that Lyco Machine Company are negotiating with us on [221] in conjunction with the lease.

Q. Copy of this list, say, including the list of machine tools contained herein, has been circulated among potential purchasers in the Bay Area?

A. Yes, there were printed copies made of that, and I have a copy of that that is a duplicate of that made from this.

(Testimony of Henry J. Arnaud.)

Mr. Peckham: At this time I will offer this to be admitted into Evidence and marked Plaintiff's Exhibit next in order.

Mr. Neblett: No objection.

The Court: Admitted.

(List of machinery was introduced and received in Evidence as Plaintiff's Exhibit No. 5.)

Mr. Peckham: No further questions.

The Court: Anything further, Mr. Neblett?

Redirect Examination

By Mr. Neblett:

Q. You were asked this morning, Mr. Arnaud, some questions relating to paragraph 3 of the bill of sale, particularly that part of the paragraph which relates to the sale of the machinery, tools and equipment. I will read the part of it I have in mind.

“Vendee for a period of ten years from date hereof will not sell or dispose of,”

and so forth, [222]

“any of the machine tools or severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or new severable production equipment.”

Are you familiar with that provision?

(Testimony of Henry J. Arnaud.)

A. Yes, I am.

Q. Now, if you were required—if the company were required to replace this machinery,—tools and equipment, could the company do so?

A. I definitely think we can for several reasons. Number one, financially the company is in very good standing. But besides that, it has the backing of very substantial people in the Bay Area, and I can name a few such as Jules Agostini, Mr. Roland, Mrs. Hanford Morgan, Charlie Field, Mr. Cox—there are thirty or forty of them. They are all outstanding citizens of the area, all men with means, and I know if necessary, which I don't think would be, they would be behind us. Then as far as the purchase of equipment, yesterday there was a man on the stand by the name of Mr. Bulotti, who contacted us at the yard and in fact he was very irritated because we were offering this equipment for sale at a price he said he couldn't sell it for. In fact, he told us he could produce all that equipment we had for sale immediately at a cheaper price. [223] That is the statement he made to us, which is altogether different from the statement he made here yesterday.

Mr. Peckham: I object on the ground that wasn't responsive to the question and move to strike the answer from the record.

A. Now, there is another——

Mr. Neblett: Wait a minute.

The Court: Oh, I think I will let it stand, Mr. Peckham. It may be in a sense a voluntary state-

(Testimony of Henry J. Arnaud.)

ment. I don't recollect Mr. Bulotti testifying as to value. I think he testified to the availability.

A. That is right.

The Court: The availability of machinery. He didn't testify as to value.

A. Besides that, naturally, we have had the availability——

Mr. Neblett: I think you have fully answered the question, Mr. Arnaud.

The Court: Let me ask you something: The names you have given me, I recognize some of them. Are they stockholders in the company?

A. They are stockholders in our company, yes.

The Court: Of course a stockholder wouldn't be liable for something, some indebtedness, of the corporation.

A. That is understood.

The Court: What is the net worth of that company, what [224] does it consist of now?

A. Well, that is a problem that I think I should refer to our accountant, don't you think so?

The Court: Yes, perhaps.

A. Because he can give you everything to date.

The Court: Of course this Oakland Dock and Warehouse Company, that is just one enterprise of a group of citizens, isn't it?

A. Well, let me explain it this way: I will say that most of the stockholders that are involved in this Oakland Dock and Warehouse property are also involved in other properties that Mr. Agostini is president of as well as president of this property,

(Testimony of Henry J. Arnaud.)

such as the Latham Square Building in Oakland, the Rialto Building in San Francisco and, oh, sixty-five large buildings. I can't say every stockholder here is involved there. I am not familiar with the others, but I know that they are involved in——

The Court: I know there was a group of men, it seems to me most of them were Alameda citizens, who acquired a number of buildings and they acquired this property, a group of men and women.

A. Well, this is a group of men and women. Mostly I would say they are all East Bay citizens, most of them at least.

Q. (By Mr. Neblett): Mr. Arnaud, that group you have mentioned, Mrs. A. Hanford Morgan and Mr. Jules J. Agostini, Mr. Charles [225] Roland, and Mr. Carl Pier and Mr. Albert Cook, I believe it is?

A. Yes.

Q. And yourself, you are a stockholder, aren't you?

A. Correct.

The Court: Of course a stockholder isn't personally liable in California for debts of a corporation.

Mr. Neblett: I understand that, your Honor, but I am asking—we brought this up to show this is a substantial concern. For instance, we remember when your Honor stated the other day in court he had represented for many years the Bank of America. Well, our firm represented the Bank of America, too, in quite a few respects and for quite some time, and we know that if something happened which the Gianninis were backing it may stand with confidence. This is not just people—so far as buying

(Testimony of Henry J. Arnaud.)

this, this piece of property was desirable, bought for an investment, and they created that brochure, and this piece of property is being developed for civic improvement, brings it back on the tax rolls in Oakland which it wasn't before, and it is really a development in which the community is highly interested and it is greatly needed in the community. I think I am justified in making that statement.

A. May I say that as far as the community is concerned——

Mr. Neblett: Just a minute, Mr. Arnaud, I think we won't have you volunteer anything. I think that is all I have to ask the witness. [226]

Mr. Peckham: I think for the record I should state the Government's position, of course, is that the financial responsibility of the corporation, which has not been established, is not the criteria of the irreparable damages.

The Court: I know that.

Mr. Peckham: Or adequate remedy at law. May I ask two short questions for the record?

The Court: Yes.

Recross-Examination

By Mr. Peckham:

Q. Mr. Arnaud, directing your attention to the machine tools that have been sold by your corporation, isn't it a fact that you have not obtained a written consent of the Secretary of the Navy or of anyone, the Munitions Board or Secretary for Defense, in order to make those specific sales?

(Testimony of Henry J. Arnaud.)

Mr. Neblett: I object to that. I think consent appears in the modified quit claim deed, and consent appears also following the modified quit claim deed, the releases and the chattel mortgage. I think it tends to vary the terms of the written contract.

The Court: I understand the position and I will let him answer because the question means with the exception of those things you have just mentioned like the modified—if he obtained any written consent other than those things. Have you?

A. I sold them on the basis of what our Counsel tells us we had a right to sell. [227]

The Court: Yes, but did you go and get a written consent other than the written consent that may be implied? A. I didn't feel I had to.

The Court: You didn't do it?

A. No, I did not. As far as the chattel mortgage, I made it a point to see that was paid off.

Q. (By Mr. Peckham): But now one more question: Directing your attention again to the machine tools that have been sold by the corporation, none of those machine tools has been replaced in the yard, isn't that correct?

A. That is correct.

Mr. Peckham: No further questions.

Mr. Neblett: That is all.

(Witness excused.)

Mr. Neblett: Mr. Deede.

Your Honor, this witness was on the stand this morning.

The Court: Yes, he went to try to find a memorandum.

RALPH G. DEEDE

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Neblett:

Q. Mr. Deede, have you found the paper which came from your office? A. Yes, I have. [228]

Q. May I see it, please?

The Court: That is the memorandum you referred to this morning from which the amended deed was drawn?

The Witness: Yes, that is right.

Mr. Neblett: I show this memorandum to Counsel.

We offer this in evidence, your Honor, this document on behalf of the Defendant.

Mr. Peckham: No objection.

The Court: Defendant's Exhibit E introduced and filed in evidence.

(Whereupon the document above referred to and marked Defendant's Exhibit E was received in evidence.)

Mr. Neblett: With your Honor's permission I will read just a part of it into the record.

The Court: Yes.

Mr. Neblett: "General Services Administration, Liquidation Service, Washington, D. C." There

(Testimony of Ralph G. Deede.)

are certain pencilled marks on the document which we aren't offering. I suppose that is inter-office communications, isn't it?

A. Yes, that is correct.

The Court: The record will show that in offering the exhibit the pencil mark notations are not part of it.

Mr. Neblett: "Mr. Robert B. Baker Bradford, Regional Director, Liquidation Service, General Services Administration, [229] 1000 Geary Street, San Francisco 9, California."

(Whereupon Defendant's Exhibit E in evidence was read into the record.)

Mr. Neblett: Then an inclosure is attached and the inclosure is the proposed modifications of the covenants and conditions of the quit claim deed.

The Court: Those are the ones in the amended deed.

Mr. Neblett: They are the same as the deed, in the amended deed.

Mr. Deede, Mr. Hull is the chief counsel for the Regional office of General Services Administration here, is he not?

A. That is correct.

Q. And do you—you say you have seen this deed as executed?

A. Yes, sir; that is right.

Q. And the deed as executed by the General Services Administration here is the same as modified by those modifications which were attached to that lease?

A. I think that is correct; I think it is identical.

(Testimony of Ralph G. Deede.)

The Court: A comparison with that will show.

Mr. Neblett: That is all.

The Court: Yes.

Mr. Peckham: Although Mr. Neblett has called Mr. Deede, your Honor, I think perhaps at this time it might be well to have Mr. Deede testify as to the machinery that has been released [230] from the chattel mortgage on the assumption that this machinery that has been sold—we now have those items.

The Court: Have you got that list?

The Witness: Yes.

The Court: All right, produce it and we will put it in evidence.

RALPH G. DEEDE

having previously been sworn, was called as a witness on behalf of the Government.

Direct Examination

By Mr. Peckham:

Q. Mr. Deede, you have in your hands the War Assets Administration folders, have you not?

A. That is correct.

Q. And are those folders—are the numbers of those folders the numbers that are found in the bill of sale of June 1, executed by Robert Bradford?

A. The—well, this isn't the exact folders, but it is a duplicate copy of the information that appears on the folders.

(Testimony of Ralph G. Deede.)

Q. I see, and does it have folder numbers?

A. Yes.

Q. And that is an official record of the War Assets Administration? A. That is correct.

Q. And is kept within your custody and control? A. That's right. [231]

Q. Now, I will show you a copy of the bill of sale with the folder numbers listed thereon, and this being a copy of the bill of sale which is annexed to the Complaint, and ask if the information contained on those folder numbers shown in the bill of sale, that they are the ones in the document that you now have? A. That is correct.

The Court: In other words, the numbers there correspond to the numbers on the bill of sale?

The Witness: Yes.

The Court: Let me ask just one question. I notice that the bill of sale is by Roman numeral. Each of those numbers represent one machine or batch of machines?

The Witness: I tell you this, your Honor, this is such a voluminous inventory that rather than to duplicate on an itemization basis, we referred to the equipment listed in those particular folders, and that is composed of several items, each folder may have as many as from ten to fifty items listed in it, and rather than to have such a voluminous bill of sale and go to that recording expense, we referred to the equipment by folder as they appear in our files.

The Court: You are about to give me a list of

(Testimony of Ralph G. Deede.)

the property upon which release has been made from the chattel mortgage?

The Witness: That is right. [232]

The Court: Were they given by folder entirely?

The Witness: Maybe I can show you this, your Honor, so you will understand it.

The Court: Part of one page, or one folder was sold.

The Witness: For example, here we start with folder 11-1 and all of this equipment appears in folder 11-1, several items on this page, and this is the original that appears in that particular folder. It shows the quantity by tag number, the condition and acquisition cost.

The Court: I see, but I asked you also when they sell—didn't sell—when they asked for releases from the chattel mortgage, partial releases, were those always by folders?

The Witness: No, they weren't. Generally they were by items except for the one exhibit, the original exhibit which was referred to in the bid invitation as Exhibit G, which was itemized, and when the Oakland Dock and Warehouse Company—and that was not covered by the National Security Clause, that was property which was more or less scrap and we authorized them to sell that at the time that we advertised this for sale, to resell it.

The Court: Yes.

The Witness: That was a voluminous document and there were certain folders that that appeared in. I think, if I recall correctly, it probably cov-

(Testimony of Ralph G. Deede.)

ered about ten or twelve different folders, but it didn't cover the equipment listed in [233] those folders in their entirety, so that the Oakland Dock and Warehouse Company asked us to establish a release price on the remaining items of equipment that appeared in those folders so that we could release it on the basis of so many folders, which we did, and since that time all the requests for releases have been on an itemized basis except for one, if I recall this correctly, and that covered a lot of items that were in the big warehouse over there, and there again it was a voluminous list, so it was released on the basis of folder numbers rather than on an itemized list.

The Court: In other words, sometimes you released it on an itemized list and sometimes on the folders?

The Witness: That is right. If it wasn't a lengthy list it was released on an item list.

Q. (By Mr. Peckham): Mr. Deede, did you have the releases, partial releases that have been executed by the War Assets Administration and delivered to the Oakland Company?

A. Yes. I don't have those right here.

The Court: Can't we just get a list of them?

Q. (By Mr. Peckham): I just thought I would put it that way and compare it with the list.

A. That is quite a job of comparison, a lot of items.

Mr. Peckham: Your Honor, there is going to be

(Testimony of Ralph G. Deede.)

a little problem, the items are so numerous that it wasn't feasible or possible at the time to make a list on a separate piece of [234] paper, so as I understand it, what has to be done, Mr. Rawleigh and Mr. Deede have gone through the folders and marked the items that have been released. They are found in that document he is now handling.

The Court: It would make this record about one thousand pages long.

The Witness: It really will, because there are a lot of articles that have been released.

The Court: Couldn't you give us a list of the items by folder and those that weren't released by folder, by inventory?

The Witness: I have copies of all those releases with me, but just on a folder basis, or a folder number basis, and then all those released on an item basis, we have copies of the releases themselves.

The Court: Couldn't you copy those all on a piece of paper?

Mr. Peckham: With sufficient time.

The Court: I'll just take his word for it. He can prepare it and you can offer it.

Mr. Peckham: All right.

The Court: Is that all right, Mr. Neblett? In other words, rather than put in all these releases with the descriptions of property, why not, can't we just put the property list on a piece of paper by description or by folder or by description itself and offer that in evidence as the property that has been disposed of?

Mr. Neblett: We have such a list here prepared by the auditor, which we will be glad to furnish Counsel. Just the list your Honor is talking about, a typed list.

Mr. Peckham: We would like to see it.

The Court: Let us get that. Is that the man from Herrick's office?

Mr. Neblett: Yes, sir.

The Court: Let him come up here. Have you got the list? You can sit next to me.

E. W. HORTON

called as a witness by the Court.

By the Court:

Q. What is your name? A. E. W. Horton.

Q. Are you connected with Lester, Herrick & Herrick? A. That is right.

Q. The record will show they are certified public accountants in San Francisco. Now, have you got a list that you prepared from the records of the defendant in this case as to property, personal property which has been acquired from the Government which has been sold?

A. That is correct, I have it right here.

Q. What did you make that list from?

A. From the facility condition report prepared by the War Assets Administration and reported as the actual sales as [236] recorded on the books of account.

The Court: Take a look at that. Think that is

(Testimony of E. W. Horton.)

approximately right? I am directing my question to the witness.

Mr. Peckham: Your Honor, the accountant hasn't been sworn.

The Court: Oh.

Mr. Peckham: I didn't know if he was to testify or not.

The Court: Is it stipulated that he was sworn and the testimony already given was given under oath? Swear him in now.

Mr. Neblett: We will so stipulate.

The Court: Just stand up here.

E. W. HORTON

called as a witness by the Court after being first duly sworn, testified as follows:

Examination by the Court

By the Court:

Q. If I asked you the same questions I had asked you before, before you were sworn, you would give the same answers? A. I would, yes, sir.

The Witness Deede: Your Honor, in looking at this list it would be impossible for me to say that these were the items that we released for this reason: The first item on here is a Bay City crane. There were several Bay City cranes over there, and unless I knew which Bay City crane it was I couldn't [237] tell whether it had been released. There have been some cranes released, however.

(Testimony of E. W. Horton.)

The next one is a crane car, Wurley crane, I don't know whether the one we released, we did release one Wurley crane. We had some drill presses listed here and there has been some drill presses released and no way I could identify. For example, I want to explain to you what I mean. On one page here we released on March 31 one drill press, the number 1206, and on the same page we released another drill press, 1210, both made by the same manufacturer, but on that page, one, two, three, four, five, six, seven, eight, ten, eleven drill presses listed on that page, so it would be impossible for me to say that these were the ones that we released as the items of equipment.

The Court: Would you take a copy of this Mr. Peckham, and I will admit this in evidence and assume it is correct unless you point out after you have checked it.

The Witness Deede: I can do this, your Honor: This is a facility condition report he is talking about. I can give this to the Counsels with an itemized statement and say that the equipment appearing on page number so and so has been released by War Assets Administration. These pages are all numbered and—if that would simplify it without having to rewrite the whole business.

Mr. Peckham: In other words, Mr. Deede, that would be [238] verifying the list by checking against the folder?

The Witness Deede: Yes.

The Court: Take the list and verify it and we

(Testimony of E. W. Horton.)

will admit the list in evidence now and then point out, if you find any discrepancies in it, what they are.

The Witness Deede: Okay, that will be all right.

The Court: I notice you have cost down here?

The Witness Horton: Yes.

The Court: Is that the cost to the Oakland, to the defendants here, or cost to the Government?

The Witness Horton: That is the cost to the defendants.

The Court: Cost to the defendants?

The Witness Horton: Purchase cost based on the ratio that the original ratio cost as shown in the facility condition report to the amount allowed under the chattel mortgage for personal property, which is 10.7 on the cost as shown.

The Court: I see. You follow that?

Mr. Peckham: In other words, the ratio of 10.7 was used, is that correct, Mr. Accountant; is that correct?

The Witness Horton: That is correct.

Mr. Peckham: In other words, the figure, the total figure of \$366,000, which was paid by the Oakland company for the personal property represented 10.7 of the original cost?

The Witness Horton: That's correct.

The Court: As given by the Government's facilities report. [239]

Mr. Peckham: Yes.

The Court: Is that correct?

The Witness Horton: That's correct.

(Testimony of E. W. Horton.)

The Court: Will you put this list that the witness—what is your name again?

The Witness Horton: Horton.

The Court: Horton has testified to in evidence and if neither one of the Counsel want to mark it, mark it as the Court's Exhibit.

The Clerk: Court's Exhibit 1 introduced and filed in evidence.

(Whereupon the document above referred to and marked Court's Exhibit 1 was received in evidence.)

Mr. Peckham: May we each have a copy?

The Court: Yes, if you don't mind.

The Witness Horton: Not at all.

The Court: Better give Mr. Neblett a copy. Anything more of this witness?

Mr. Peckham: Nothing at the present time, your Honor.

The Court: You want to examine Mr. Horton now?

Mr. Neblett: No, your Honor.

The Court: Anything else?

Mr. Peckham: Just one point of the accountant, your Honor. There is the question that has come up from time to time as [240] to the financial responsibility of the corporation. While the Government doesn't, as you understand our position, doesn't feel in this case to determine the adequacy at law, I wonder if your Honor would want any

(Testimony of E. W. Horton.)

testimony as to the net worth of the corporation.

The Court: Can you state offhand the net worth of this corporation at the present time?

The Witness Horton: The shareholders' equity as reflected as of May 31, 1950, shows approximately \$316,000.

The Court: \$316,000.

The Witness Horton: The shareholders.

The Court: By that you mean that is over and above what they still owe the Government?

The Witness Horton: That is the net worth, \$316,000.

The Court: What liabilities are taken off the gross worth to make that net worth?

The Witness Horton: Approximately?

The Court: Approximately, yes. What are they, the balance due the Government?

The Witness Horton: Due the Government and accounts payable. Accounts payable are \$20,000 and the amount under the quit claim deed and the chattel mortgage is about \$752,000.

The Court: Anything more from him?

Mr. Neblett: No, your Honor.

(Both witnesses excused.) [241]

Mr. Peckham: Your Honor, at this time I would like to make a statement. It was our intention, after ascertaining specific pieces of property that have been released from the chattel mortgage and assumed to have been sold, and also having the entire list of the personal property that is there and also having a list of the property that Lyco Company

desires to have included in a long term lease, if one is to be executed, that we would call a competent witness or witnesses to testify as to the sale of the property that is not to be included in the list that Lyco desires, that the sale of that property would reduce the capacity of the plant. The witness that we desired to call is Mr. Vaughn, who was superintendent of this particular yard during the war and operated the yard and who is now general superintendent of Moore Dry Dock Company. Mr. Miller, of Probeck Phlager and Harrison informs me now that they cannot reach Mr. Vaughn, that he is out in the yard somewhere and Mr. Wille who testified yesterday is in the courtroom. However, Mr. Wille, as your Honor recalls was qualified as an expert from the point of view of purchasing and not from the point of view of operating the ship yard, and it would seem to me as though it would be necessary for us to establish that particular point, that we call Mr. Vaughn.

The Court: Maybe Mr.—I will allow you to do that after the evidence is furnished, whatever evidence he has got [242] to introduce, and then if he wants to controvert what Mr. Vaughn says, then I will let him. Do you have any other witnesses?

Mr. Neblett: The Defendant rests, your Honor.

The Court: Now, you understand that Mr. Peckham wants to introduce testimony of Mr. Vaughn, who used to operate that yard for Moore Shipbuilding Company, for the purpose of showing that this machinery, which is not to be leased to Lyco but is purported to be sold, would prevent it—what is that language again? I can't remember.

Mr. Peckham: Material reduction of capacity.

The Court: Would materially reduce the capacity of the plant to produce the items for which it was designed. And I told them I would allow them to do so and allow you to introduce anything to controvert that. You understand what I mean?

Mr. Neblett: I understand what you mean.

The Court: In other words, the statements in the Complaint and the statements in your counter affidavits are, in a sense, conclusions. You deny what is being done reduces the plant's capacity, whatever it is, and the Government claims it would, and it may have a bearing on this subject, I don't say it has, but it may have a bearing on the subject. Certainly, if it was disclosed that it didn't make a particle of difference as to the capacity of this plant that you give away, throw away [243] the obsolete stuff and so forth and sold it, I wouldn't feel like granting an injunction on that basis. On the contrary, if it appeared to me if one of the elements was to reduce this plant to such a condition that it never could perform what is was intended to perform when it was built and that vitally affected the National policy, then I might more seriously consider the proposition.

Mr. Neblett: If your Honor please, we would interpose an objection to that testimony because we haven't yet gotten down to it—it has been introduced in evidence, but has been reserved for evidence, to point out to the Court how this whole situation has changed since the quit claim deed was modified. In other words, it is true, as alleged in our affidavit that we first asserted that the whole

transaction was void and then the quit claim deed was modified so that the Security Clause was taken out entirely as to the personal property.

The Court: I want to hear from you on that in just a few minutes, but right now you're finished putting in whatever evidence you have to offer today?

Mr. Neblett: I have, your Honor.

The Court: Mr. Peckham wants to offer this testimony to which you object. You haven't your man here now?

Mr. Peckham: His name is Mr. Knapp, your Honor.

The Court: Mr. Knapp. Mr. Clerk, what is the state of the calendar for tomorrow morning, just to give me an idea? [244]

The Clerk: I don't believe we have much on the calendar for tomorrow.

The Court: Then I will allow Mr. Knapp to testify tomorrow at 10:30 if you can reach him.

Mr. Peckham: Surely.

The Court: Then if Colonel Neblett wants any time to contradict what he says or bring in anything I will give him an opportunity to do that. So that is all the evidence with the exception of Knapp and anybody Mr. Neblett wants to use to contradict what Mr. Knapp says, is that correct?

Mr. Peckham: Yes.

Mr. Neblett: I think so.

The Court: Then I want to hear from you, Mr. Neblett, as to how that amended deed—just on this

subject, no use going back over everything else we have covered; we have the record on it and I have notes on it—how did that change the bill of sale.

Mr. Neblett: I will be glad to do that, your Honor.

The Court: Would you like a recess for a minute or so so you could get your data together here?

Mr. Neblett: I believe that would be desirable.

Mr. Peckham: Your Honor, there is one point I want to bring up in connection with the evidence. There has been reference made in the testimony of Mr. Arnaud that a list of machinery had been compiled that was the subject of negotiation [245] between Lyco Company and Oakland Company, and I don't believe that was ever placed in evidence, and to what extent that might be important in your Honor's determination of the material reduction of the capacity of the plant, to that extent I think it should be in.

The Court: Who has got that?

Mr. Neblett: I have. I will be glad to produce it.

The Court: Could you produce it in evidence and have it marked? Have it marked as the Court's exhibit, if you wish.

Mr. Neblett: In order that this transaction may be complete, there have been some changes in it. To show what the negotiations are that are going on with Lyco, I will make this statement as Counsel in the case, that when Mr. Agostini, the president, and Mr. Arnaud, vice-president were approached on this proposition to make a lease, Lyco Machine Works through Mr. Mark Hardin, the president,

and Mr. Walter Lynch, the vice-president asked for a letter giving a general outline of the proposition; and such a letter was written by Mr. Agostini the president of the corporation, on May 26. I don't have all the exhibits to that letter, but I do have the machines list. However, we could produce them. I don't think the Court would be interested in bound books, photographs, and things of that sort. But we do have these two lists and are perfectly willing to make them available to the Court and Counsel.

Would the Court suggest I introduce it in evidence ? I [246] would be glad to do that.

The Court: Yes. I understand the list is a list that they proposed to include in the new lease to Lyco?

Mr. Peckham: Yes. Of course, Counsel made comments from time to time which I haven't answered. I would like to make this comment at this time, and that is this restraining order now, and if a preliminary injunction issues, of course has no effect on the lease that might be negotiated between Lyco and Oakland.

The Court: If I issued any restraining order I certainly would make it without prejudice to their right to lease to Lyco.

Mr. Peckham: They have actually been leasing the property over there under the Security Clause, and so that really I don't think is a determining factor.

The Court: What you are calling for now is a list of the property that they propose in this new

proposed list that they have negotiated to lease to Lyco, is that correct?

Mr. Peckham: Yes.

The Court: Well, you might look that over during the recess and see if you will accept that in evidence, and Mr. Neblett will offer it.

Mr. Neblett: The question has arisen, while Counsel is looking at that list, the question has arisen in regard to our right of the company to lease the property. That question [247] is not involved here at all. We have a clear right under the bill of sale.

Mr. Peckham: That is right.

Mr. Neblett: The quit claim deed, as well as——

The Court: They have a right to lease it subject to the Security Clause.

Mr. Neblett: Subject to whatever——

The Court: Whatever conditions are. Assuming that there are certain conditions to the bill of sale that are modified by the amended deed, you would have a right, perfect right, to lease the property subject to those conditions. No doubt in my mind about that.

Mr. Neblett: Very well.

The Court: But I would like to hear from you at the end of the recess on this question of that amended deed, how it affects the situation.

Mr. Neblett: Very well. I am willing to offer this if Counsel wants it, this machinery wanted in the machine shop by Lyco. I have it here.

The Court: All right. I will admit it in evidence as a purported list of the machinery that Lyco was

contemplating taking in the fifteen year lease that is now being negotiated. Is that correct?

Mr. Neblett: Yes, your Honor.

(Document entitled "List of Machinery" was admitted into Evidence as the Court's Exhibit No. 2.) [248]

(Thereupon a short recess was taken.)

The Court: All right, Mr. Neblett.

Mr. Neblett: Your Honor please, I will carefully refrain from covering anything that we have covered in argument before. This our point that we have that was mainly raised by the affidavits and the Answer and by the testimony of Admiral Klein here this morning.

To start with, we had a Letter of Intent. That was the first thing, the first document in this transaction which had anything to do with the situation that in my belief is before the Court at this time. And that Letter of Intent is Plaintiff's Exhibit 1 and it says, among other things, that, "title to be conveyed by quit claim deed and bill of sale without warranty, express or implied, and you will execute a promissory note secured by a deed of trust and chattel mortgage," then the other things about who is going to pay for the recording, and so forth.

The quit claim deed and the bill of sale were executed pursuant to that Letter of Intent. Under the Letter of Intent the Oakland Dock and Warehouse Company had to take possession of the property on June 1, 1949. But there were quite a few discussions between War Assets and the Company, in which I

participated, that carried the execution of those title instruments over until June 29th, but they were executed as of June 1, 1949. [249]

We had the bill of sale, which is attached to the Complaint as exhibit 1. That was delivered to us at the same time and it has come up here from time to time that that bill of sale was recorded. That is an error. It never has been recorded. That has come up in statements between Counsel here from time to time, but the bill of sale was not recorded. The quit claim deed, however, was recorded, the chattel mortgage was recorded, and the deed of trust naturally was recorded.

We have a bill of sale here which says that the chattels are conveyed outright "to the vendee, Oakland Dock and Warehouse Company by the Government, vendor, to have and to hold the same unto the said vendee, its successors and assigns, without representation of warranty, express or implied, as to the title or condition thereof, subject to the following covenants, restrictions, conditions and reservations."

The Court: I am familiar with that.

Mr. Neblett: Yes, I know, your Honor. I am trying to tie it in to the quit claim deed. The only Security Clause reserved in the bill of sale is the one which refers back to the quit claim deed.

Now in paragraph 1, "the Government owned portions of the Moore Dry Dock Company West Yard, Oakland, California hereinafter referred to as the 'plant,' in which the above described chattels are located, is considered a War Reserve Plant and

of such will be of vital interest to the Nation [250] in time of emergency.”

I don't think that recital means anything at all. It is just a declaration of interest, we will say, or declaratory of possible interest in the future.

This, however, is important: “In a quit claim deed, of even date, and delivered concurrently herewith, whereby the vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the vendee herein, the vendor herein has reserved a dormant estate in said plant, for a priod of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each.”

The importance of that reference, your Honor, is that there is no reservation of a Security Clause in the bill of sale if we do not have that quit claim deed in connection with it, because in no place in the bill of sale does it say how, when, or what circumstances the Government might activate the dormant estate.

It is generally conceded by everybody now that the Government has an option to lease that property. That is what it has now. The first option to lease, we contend, was void, but that is out of the picture because we concede that the modification of the quit claim deed and the option to lease which the Government now has to lease the place is valid in our opinion, signed by both parties and expresses the option to [251] lease in terms which we think are perfectly sound in law.

It has been said by Counsel that this case is so im-

portant because the entire Industrial Reserve hangs upon the decision of this Court. That is an erroneous statement by Counsel because the Government still preserves that Security Clause for the purpose for which it desired it from these amendments.

Your Honor, it is unnecessary for me to trace how this determination arose. I think the Court remembers the testimony of Admiral Klein, introduced this morning, and the testimony of Mr. Deede, which finally got the proposed modification approved by the Munitions Board or Department of Defense in the hands of the War Assets Administration regional office where that amended quit claim deed was executed. We have to go back to the old quit claim deed now for the purpose of showing how the document was modified so as to remove the Security Clause entirely from the personal property, even though it at one time existed—even though it was valid in the first instance.

We have attached to the affidavit of Mr. Agostini a copy of the original quit claim deed, and that has been now introduced in evidence. That was an outright conveyance, that quit claim deed, of the real property and improvements thereon to Oakland Dock and Warehouse Company. It reserved the dormant estate, and so forth.

Paragraph 3 of that quit claim deed provides that: [252]

“The grantee, or the secretary, may at any time cause a re-examination of the necessity for continuing the dormant estate upon the plant or any portion thereof. Such estate may be discontinued at

any time during the twenty year period when the Secretary determines such action consistent with the National Defense inteerststs of the United States.”

Well, we move in under that paragraph. I wouldn't like to say that when these deeds were given to us that I felt at all that this Security Clause as put forth in those deeds was valid. I didn't think so, your Honor, and said so very freely. I merely say that to make my position clear on it.

We made our application under paragraph 3 to remove the Security Clause altogether. And the conclusion of our principal was that the Security Clause was void and the Government would not desire to hold over the heads of its citizens a void deed. But there was a rather qualified disagreement with us by the Navy only. We were referred to the Navy, as the evidence already shows, and Counsel for the Navy, the argument there was, while there was no common law background to this dormant estate, that nevertheless the Secretary or Assistant Secretary of the Navy and attorneys for the Navy believed it would be upheld by the courts on the broad general ground of public policy.

Well, the original quit claim deed provided this in paragraph 10: [253]

“The grantee will maintain all lands, structures and appurtenances now in or appurtenant to the plant and belonging to The United States of America at the time of sale through the period specified below in such condition that the plant can be put into efficient operation for

its intended defense use in the shortest possible time, but in no case in excess of 120 days; provided, however, that grantee shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified;”

I want to read that again.

“shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified; and provided further that nothing contained in this agreement shall be construed to prevent the grantee, for improving operating efficiency or increasing productive capacity from moving any of the machine tools or readily severable facilities conveyed hereunder from place to place within the plant.”

Now, we have in that deed the following paragraph, facility on one side and period of maintenance on the other.

The Court: What are you reading from?

Mr. Neblett: From the original quit claim deed.

The Court: Oh. [254]

Mr. Neblett: The one referred to in the bill of sale as the so-called dormant estate or security clause.

Paragraph A:

“Lands, permanent structures and appurtenances (main structural frame of metal, concrete or masonry) twenty years.

“(B) Timber structures and their appurtenances, fifteen years.

“(C) Machinery, machine tools and equipment, ten years.”

Now, that is the only Security Clause with respect to the machinery tools and equipment that have ever been reserved.

Now, there are provisions further in this quit claim deed for the activation of this estate. In other words, the Secretary, in the event of an emergency can activate the estate and take it over. This is the old quit claim deed I am talking about—take it over and operate it for periods of not to exceed five years each. There is no reverter in the deed, and this original quit claim deed did not comply with the Security Clause in force at that time. Somehow or other there was written into this deed, I don't know how, because we had nothing to do with it, the old Security Clause that was in force and effect prior to the time of the passage of Public Law 883, and it did not write into this deed such requirements as the Munitions Board required to be put into the [255] quit claim deed, such as this property had to be designated under Public Law 883, and it was held and so forth.

Now, if your Honor please, when we came to the discussion of this thing, it is apparent from this deed and from the evidence that is before this Court now and from the evidence that was introduced here this morning by Counsel for the Government, namely, the report of 1949, that the only thing that

the Government was interested in was sites. Now why is this not an important case from the standpoint of the Industrial Reserve? Because the Government had gotten exactly what it wanted as shown by this letter that was written here by Mr. Joyce saying that the Munitions Board is quite anxious to have this matter taken care of as soon as possible. That is the amendment he is talking about.

Now, this amendment, it came up, of course, as shown by the report of the Munitions Board, that the site is the only thing involved in the matter of the Security Clause, made its full vigor on that site. It is only the machinery that the Security Clause—we will refer now to the modifications of the quit claim deed, and looking at the deed we will find that the provisions about the Security Clause on the personal property is ten years, has been omitted and deleted from that deed. It isn't in there any more. So we have been talking about something here that does not if—I made the statement this morning—that if the Government had put this amended [256] quit claim deed in its Complaint, it properly, couldn't possibly state a cause of action.

How does the new paragraph 10 read? These paragraphs are the same all the way through, they are numbered the same, each paragraph corresponds; I think that is true. Now, here is what the new—I may be wrong about the corresponding paragraphs—here's what the new paragraph 9 provides in the modified quit claim deed.

“During the twenty-year period, the grantee will not make any alterations, improvements,

additions or extensions to the buildings and structures or erect any new building or structure on the premises which would diminish the capacity or impair the utility of the plant for the business for which it was designed, unless the plant can be restored to efficient operation for its designed purpose within not to exceed 120 days.”

Now, there is another provision in the deed that it would be the duty of the grantee, the Oakland Dock and Warehouse Company, to put this plant into operation on whatever notice is given by the Secretary of Defense for whatever use the Secretary of Defense might put it. The Secretary of Defense may use this to manufacture guided missiles. It is apparent from the reports of the Munitions Board of 1950 that he is not going to use it to build ships, but that is not an important argument here. [257]

Let us go on to paragraph 9:

“... provided, the grantee, during the twenty-year period may, alter, improve, add to or extend any or all of the buildings or structures now on the property,”

that is what we propose to do with the lease when it is made, we intend, they can extend and alter that building to make it large enough for their purposes, evidently isn't large enough for their purposes at this time.

“erect additional buildings and structures on all or any part of the premises not now occupied by the permanent buildings and the

piers and (3) replace any of the piers and non-permanent buildings and structures with piers and buildings or structures having equivalent capacity.”

Now, that gives the right to do anything in the world that we want to do with the real property, provided it could be—that the Secretary of Defense could take it over in 120 days. Now, that is a question of judgment, that is a question of whether or not we build something, and that has to be torn down, the Government has a right to tear it down. We have to tear it down within 120 days if the Government wants us to provided the labor and materials are available, but otherwise, the Government has to do it itself and then the Government has to restore those buildings to the same condition they were at the time of the Government’s occupancy, or pay for the restoration of it. And it has to pay us rent during all this [258] time.

The only advantage of this contract as over eminent domain is that we have a contract with the Government. Now, that gives them rights to take possession within 120 days and it gives the right—in other words, the damage is a form of rent and restoration and set in advance. We have a contract with the Government.

The Court: How does this—I follow you to a certain extent. Of course, the original quit claim deed and the bill of sale made and the original bill of sale, it referred to the execution of the quit claim deed. How does this affect the conditions on the bill of sale?

Mr. Neblett: Well, the conditions—the only right of the Government to take over is found in the quit claim deed, and now that provision which the Government reserves the right to take over the personal property within a period of ten years from the date of this deed has not yet been eliminated from the quit claim deed. That was one of the principal points we had in argument. We would not go into this detail unless it were eliminated from the Security Clause. The old Security Clause provided that we had to maintain this property for ten years for taking over by the Government, but that Security Clause is no longer there, that maintenance for ten years as to the personal property. We now have twenty years as to the land and permanent buildings, of which there are only two on [259] the property, that the Government—suppose the Government were to come out on the modified quit claim deed and say now, we demand that you have all of this machinery now that we sold you, we reserved an interest in it. Well, an answer would be, where did you reserve this interest for us to keep it ten years so you could take it over? It isn't in here any more; it was in the original deed, but not in this one.

That was the main point. We realize and the Government realizes, in these discussions, the Navy and the Munitions Board and the Department of Defense, that we couldn't maintain that machinery over the property, crane rails thirty-five feet wide, interlacing the property, and build these buildings which they permit us to build. That was the reason

for taking out the ten year reservation with respect to the personal property.

There are other clauses which carry along, that is, in this deed, and this deed was made February 28th of this year with full knowledge of everything we were doing in the matter, with full knowledge of what we were going to do, with the full knowledge on the part of the defendants that we were going to sell this equipment, and I imagine that was the reason it was done. We wouldn't have touched—no point to us maintaining the ship yard up there—be no point of their modifying the deed and letting this machinery, tools and equipment rot for the duration with the rate of depreciation, almost depreciated [260] now. That is the reason for it.

The Court: Well, I will have to interrupt you, Mr. Neblett, because it is 4:00 o'clock and I have a habeas corpus proceeding on now, so we will continue this matter at 10:30 tomorrow morning. Have Mr. Knapp here.

Mr. Peckham: Yes.

The Court: And the arguments will be concluded.

Mr. Neblett: Very well, your Honor.

(Thereupon an adjournment was taken until Thursday, June 22, 1950 at 10:30 o'clock a.m.) [261]

Thursday, June 22, 1950, 10:30 o'Clock A.M.

The Clerk: United States versus Oakland Dock and Warehouse Company.

Mr. Neblett: If your Honor please, for the con-

venience of the Court I have here the original bill of sale, the original quit claim deed, and the modification of the covenants and conditions of the quit claim deed, and Public Law Number 883 in one spot. I was going to pass these to the Court, if it would be a convenience to the Court, instead of looking for them to the files. If the Court would like to have these before it when I am making my argument——

The Court: I would like to have them, and also that pamphlet of the law.

Mr. Neblett: These have all been introduced in Evidence, if your Honor recalls.

The Court: I think if there is any additional testimony, before there is any additional argument we should have that testimony now.

Mr. Neblett: Very well, your Honor.

Mr. Peckham: Your Honor, yesterday when Mr. Deede was on the stand he referred to a thick document in which there were the folders on which these specific items of personal property were listed. He only has the official copy with him again this morning. However, I believe there is a copy, [262] duplicate copy in the War Assets Administration Office. He identified it yesterday, and I wondered if Counsel perhaps would permit the introduction of that in Evidence if it is produced later today? I think that it would be—it would complete the record if we had the complete inventory of all personal property that was sold included as Evidence in this hearing.

The Court: Well, I thought we had that com-

pleted by the document that was introduced here by the auditor of the defendants.

Mr. Peckham: Well, that was a document of the items that had been sold.

The Court: Yes.

Mr. Peckham: Then this large document contained the folder lists all the personal property sold and unsold.

The Court: Oh, I see. If there is an extra copy, if you care to put it in Evidence.

Mr. Peckham: Yes. I will request that later.

The Court: Yes.

Mr. Peckham: At this time I will call Mr. Knapp.

SEWELL A. KNAPP

called as a witness on behalf of the Government in rebuttal, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court?

A. Sewell A. Knapp. [263]

Direct Examination

By Mr. Peckham:

Q. Mr. Knapp, what is your address?

A. My home address?

Q. Yes, sir.

A. 6257 Acacia Avenue, Oakland.

Q. What is your position at present?

A. General Superintendent of Moore Drydock Company.

Q. Briefly, what are your duties in that position?

(Testimony of Sewell A. Knapp.)

A. In charge of operations of the yard.

Q. Have you been with the Moore Drydock Company over a period of years?

A. Been in continuous operations since 1938. First went to work for them in 1916, worked various times previous between 1916 and 1938.

Q. Did you resume work for them during 1938?

A. Yes.

Q. During the period 1938 to 1946, in what capacity did you serve the Moore Drydock Company?

A. When I first went in, I went in as assistant general superintendent to Mr. Harold, and in 1942 or thereabouts I was appointed manager of construction repair for both yards, east and west yards.

Q. What was your capacity in relation to the west yard?

A. In charge of the Maritime Commission program of construction in the yard and improvements. [264]

Q. That was during the period of the last war, is that correct? A. Yes.

Q. You are familiar with the machine tools and equipment that are located at the west yard?

A. Yes, I know the machine shop and tools.

Q. Are you familiar with that portion of the yard which has been sold to Oakland Dock and Warehouse Company?

A. I am not too familiar, but I understand it is the property on the west side of the yard, from the present Western Pacific diesel repair yard.

Q. I show you Defendant's Exhibit B, which is

(Testimony of Sewell A. Knapp.)

a map of the yard. Can you identify the Oakland portion?

A. This was, I understand, this was the property on this side here (indicating). This is still Western Pacific.

Mr. Neblett: Your Honor please, may the witness and Counsel raise their voices? I can't hear it.

The Court: Yes, speak a little louder, both of you.

A. This one, I understand, is the west yard that the Oakland Dock people have now. This is the piece of property that belongs to the Western Pacific Company and leased by the Government.

Mr. Peckham: This portion you have identified here, the west yard, Moore Drydock Company?

A. Yes.

The Court: The record doesn't show. If you have a blue [265] or red pencil——

Q. (By Mr. Peckham): The portion red pencilled is the portion that the Oakland Dock and Warehouse Company now owns, is that correct?

A. That is as I understand it, yes.

The Court: This is Exhibit——?

Mr. Peckham: Exhibit B of the Defendant.

A. This was part of the original. This has been reverted to the Western Pacific.

Q. (By Mr. Packham): Within that red outlined portion of Defendant's Exhibit B, you are and have been familiar with the machine tools and equipment that were located there?

A. Yes, sir.

(Testimony of Sewell A. Knapp.)

Q. Mr. Knapp, I show you the Court's Exhibit No. 1, which is a list of machinery and machine tools, this being the list that was introduced in Evidence by the accountant, presented by the accountant, and ask you if you identify those pieces of machine tool as the type that were in the Moore Drydock yard there at the west yard?

A. Well, this is equipment, I can say, that was in the west yard, similar type. The names are similar. Standard equipment which is in there.

Q. Then in the event that those pieces of machinery and machine tools were removed from the yard, would that materially reduce the capacity of the plant to produce the items for which it was [266] designed?

A. Well, in what I see here, if it is listed as 1, 1, 1, all the way through, which I guess it is, that wouldn't materially reduce the capacity. It would be probably, the radial drill and things like that in the machine shop, it is all very variable. You have a lot of expendable material down here.

Q. What items there would tend to reduce the capacity of the plant, Mr. Knapp?

A. I would say your Whirley crane, that is one of them. Then you get into the drill presses, radial drill, lathes, shapers, wheel press, electric drills—of course during the Second World War electric drills were almost impossible to get. I don't know how it would be now. Impact wrenches was another very hard to get. Hoists listed here, that is a \$2800 item. That is not so bad.

(Testimony of Sewell A. Knapp.)

Q. I see.

The Court: Suppose those machines listed there—are they one apiece, most of them?

A. I think it is, though there is no indication whether it is one or multiple. There is a crane listed at \$8,000, so that must be one crane. Those cranes are worth a great deal of money when purchased, much more than that.

Mr. Peckham: These costs, your Honor, were the costs to the Oakland Company, not the original acquisition cost. [267]

The Court: Yes. Well, in your opinion, suppose those articles on that list were taken from the yard, would it materially reduce the capacity of that plant over there to produce the items, these ships and so forth?

A. I wouldn't say greatly. You could feel it in the machine shop tools mainly.

The Court: In other words the plant, supposing war broke out, the plant could continue even though those had been taken away, could produce the ships?

A. Yes.

The Court: And accomplish the things for which it was built?

A. Yes, on that list you showed me there.

The Court: I suppose over there you have more or less duplication for emergency purposes?

A. We have duplicate machines in there because you have duplicate work going through. That is why there are two or three types, two or three lathes of the same type. Shapers, milling machines, same thing.

(Testimony of Sewell A. Knapp.)

The Court: You have to have that because there is more than one workman to produce them?

A. Yes, sir.

The Court: All right.

Q. (By Mr. Peckham): Mr. Knapp, I show you Plaintiff's Exhibit 5, which has been introduced in Evidence, and is a [268] circular prepared by the Oakland Dock and Warehouse Company showing the items of machinery located at the yard that are being offered for sale. I wish you would look over that list (handing document to the witness).

The Court: Have you had an opportunity now, Mr. Knapp, to look over that? A. Yes.

Q. (By Mr. Peckham): Mr. Knapp, you recognize those items as items having been in the yard?

A. A number of them, yes. A good many of them, I know the unit.

Q. In the event, Mr. Knapp, that those items shown there on Plaintiff's Exhibit 5, the list you have in your hand, were removed, disposed of from the yard, would the removal and disposition of those items materially reduce the capacity of the plant to produce the items for which it was built?

A. Very definitely.

Q. On that list do you find so-called heavy type of machine tools? A. Yes, sir.

Q. Would you identify some of those?

A. Take your Tag No. 12, Niles tool. It is a lathe. 52" swing on a 32 foot center. That is one of the lifting tools with a bed break ten feet from the

(Testimony of Sewell A. Knapp.)

head stump. Radial drills, Tag No. 5. Tag No. 13, a Niles lathe there. [269]

Q. Could you just generally identify them, without specifically——

A. Yes. Just the tag numbers?

Q. Just the type of machinery, just what they are.

A. There is a slotter, shaper, shapers, milling machines, another lathe, radial drill, radial drill—that is about—in the machine tools there, that is about all, I would say, heavy tools.

Q. There are cranes listed there.

A. Cranes listed here. There are four fifteen tons; three, forty-five tons; one fifty ton; ten ton Cyclops travelling bridge crane. All those are large units.

The Court: May I see that for a minute? Do you have the record showing that the witness has been referring to Plaintiff's Exhibit 5?

Mr. Peckham: Yes, your Honor.

The Court: Now that Court's Exhibit there that you showed him there before, does Plaintiff's Exhibit 5 include the articles shown on Court's Exhibit 1?

Mr. Peckham: I believe it does, your Honor, but a small portion of them that have already been sold.

The Court: Yes. In other words, Plaintiff's Exhibit 5 covers that sold and that still offered for sale?

Mr. Peckham: That is right.

(Testimony of Sewell A. Knapp.)

Q. If any substantial portion of the items listed on Plaintiff's Exhibit 5 were sold, would that materially reduce the capacity [270] of the plant?

A. Yes.

Q. Is it your conclusion from having read over this list on Exhibit 5, Mr. Knapp, that most of the essential machine tools there in the yard are listed here?

A. No, not all of them. There is a lot more equipment in the machine shop that is not listed there

Q. I see. But there are essential items listed?

A. Essential tools. We used every one of those tools during the last war.

Mr. Peckham: No further questions.

Cross-Examination

By Mr. Neblett:

Q. Did I correctly understand your name to be Mr. Knapp? A. Yes, sir.

Q. K-n-a-p-p? A. K-n-a-p-p.

Q. Mr. Knapp, you tell us that you were familiar with the yard from the inception down to the present time?

A. Not from its inception, no, sir. Since about approximately '42, latter part of '42.

Q. '42? A. 1942.

Q. Well, the yard was full and complete—the yard was completed in 1942? [271]

A. That is right, sir. It was operated as a Navy

(Testimony of Sewell A. Knapp.)

yard previous to that. The first part of the work over there was for the Navy.

Q. You were with the Navy Departemnt?

A. No, sir, I was operating over there in the Maritime Commission after the Navy program was practically finished.

Q. The Maritime Commission operated the yard, anyhow, didn't it, during the war?

A. Yes, sir.

Q. And Moore Drydock Company, that is the old Moore Drydock Company, wasn't actually—they actually did the work for the Maritime Commission, is that correct?

A. They managed the yard there, is that correct?

Q. Yes.

A. They managed the yard there.

Q. You said, as I understood your testimony a while ago, that the sale of certain tools and equipment which were listed on the list which was presented to you would materially reduce the plant capacity. The plant's capacity to do what?

A. Which list of tools are you referring to?

Q. The list you testified from.

A. There are two lists there. The first or second list.

Q. I don't know what the first list contained. I couldn't hear everything that was going on, I am sorry.

Mr. Peckham: Court's Exhibit 1.

The Court: The list on Exhibit 5 is the one which he [272] said if a substantial portion of Ex-

(Testimony of Sewell A. Knapp.)

hibit 5—that is the one with the blue cover there—were removed from the plant it would materially reduce its capacity to produce the items that it formerly produced there.

Mr. Neblett: In other words, reduce the capacity of the yard to build ships, is that your answer?

A. Yes, sir.

Q. Would it reduce the capacity of the yard as a terminal warehouse facility?

A. I don't think that has any bearing on it. You are talking about building ships now. I don't know anything about your warehouse business.

Q. Then your answer would be that it would not reduce its capacity as a terminal warehouse facility?

A. I don't know, sir.

Q. You say that this equipment is difficult to procure, some of this equipment that you mentioned?

A. I don't know how it is today, but I know during the last emergency we were under terrific pressure to get it.

Q. You don't know whether it is difficult to get it now or not, do you? A. No, sir.

Q. You are familiar with the former yards known as the Richmond Yard, the General Engineers, Todd Shipbuilding and so forth? [273]

A. Yes.

Q. Are you familiar with the work at Terminal Island, Los Angeles, and Western Pipe and Steel?

A. I was at both of the yards during the war.

(Testimony of Sewell A. Knapp.)

Q. You knew General Engineers, the equipment of General Engineers had been sold and very largely all of it was sold at Richmond, is that so?

A. I believe so.

Q. And are you familiar with the condition at Mare Island and Hunters Point at this time?

A. No, sir.

Q. Do you know what capacity they are working at?

A. No, sir.

Q. What capacity is your yard working at at the present time?

A. At the present time the repair yard is pretty near up to capacity for a few days.

Q. What has been your general experience over the past year? Have you worked at capacity for the last year?

A. I would say at about seventy-five per cent capacity in the old yard, in the east yard for repairs.

Q. You were able to take care of all the work that is brought to you, are you not, or has been brought to you in the last year?

A. At the present time, yes.

Q. Do you recall that, from looking at the exhibit and from [274] your general knowledge of the yard, that Oakland Dock and Warehouse and company only purchased the outfitting portion of the Moore Drydock West Yard?

A. That is what I understand. I have nothing to do with that part of the business of the yard so I can't answer definitely. That is only my understand-

(Testimony of Sewell A. Knapp.)

ing, that they own the portion indicated in this map, the west portion.

Q. That is the Western Pacific property still held by the Government?

A. That is what I understand.

Q. Is it possible, Mr. Knapp, to use the west half of the yard purchased by Oakland Dock and Warehouse Company as a shipbuilding facility without the east half of the Western Pacific lease?

A. For shipbuilding proper, no, sir, you would have to revamp that yard to build ships there if you didn't have the Western Pacific property.

The Court: What was that last answer?

A. If they wanted to build ships there they would have to have the Western Pacific property or rebuild the yard to be able to build ships on that west side. You have no building slips there.

The Court: How about the repair of ships?

A. Repairing ships, you can repair and convert ships there and overhaul them under the present set up. [275]

Q. (By Mr. Neblett): You could without dry-docks? A. Yes.

Q. That would be the interior and superstructure, of course, only?

A. That is right. They are doing that, your repair of ships along the waterfront right now and they have no drydocks. I could mention two or three names.

Q. This along the west half of the yard purchased by Oakland Dock and Warehouse Company,

(Testimony of Sewell A. Knapp.)

this was designed as a ship building plant, isn't that so? A. Yes.

Q. It has never been used for anything else by the Maritime Commission or the Government, isn't that right? A. That is right.

Q. Ships were built there during the war?

A. That is right.

Q. There was never anything repaired, any repair work or anything done there by the Government that you know of, was there?

A. A lot of repair work.

Q. You worked there during the time the plant was active, or most of the time, did you not?

A. Yes, sir, from the time the Maritime Commission took it over until the yard was closed.

Q. Do you recall, Mr. Knapp, offhand when the yard was closed? [276]

A. In '46, I think was the year, '46.

Q. Was it closed right after the war in '45?

A. No. Considerable work after that.

Q. It closed——

A. 1946 is about the date we left over there, I think you will find.

Q. I can give you the date that the yard was declared surplus by the Maritime Commission, June 20, 1946. That would be approximately the date they quit work, approximately?

A. Somewhere around there. They quit work around the first of the year.

Q. Do you recall your company having been made an offer to purchase both the east half and the

(Testimony of Sewell A. Knapp.)

west half of the Moore Drydock Company west yard in 1947?

A. I don't know anything about it. All hearsay. I have nothing to do with that, so it is only what I hear.

Q. What do you think would be the value in 1947 of the entire east and west yard, I mean the east and west half of the Moore Drydock Company west yard?

A. In dollars and cents?

Q. Yes. A. I haven't the faintest idea.

Q. Would it influence your opinion on that subject if you knew that Moore Drydock Company offered \$500,001 for the whole place on June 10, 1947? [277]

A. It wouldn't influence me one way or the other. I don't know anything about the dollars and cents of it.

The Court: The witness said he had no opinion, so you couldn't influence his opinion.

Mr. Neblett: I think your Honor is right. He said he didn't have anything to do with that.

Q. You are the technical man, are you not, Mr. Knapp?

A. Production.

Q. I mean production man. You are not in the business end of it?

A. No, sir.

Q. Have you found the tools and equipment that you have testified to as being hard to get during the war are hard to get now or are there plenty of them on the market now?

A. Well, I can't say definitely on that. There are

(Testimony of Sewell A. Knapp.)

tools I know we have been trying to get for the old shop that take a number of months to get them.

Q. Well, I will ask you—this is largely repetition, but you said during—you seem to know a great deal about it, so I will ask you again, this shipyard, the west end, was designed for a ship building plant, we agree on that. A. Yes.

Q. And I ask you again if you will testify—well, I have asked that. That is repetition. You have already told me, you have already answered the question it couldn't be used for [278] a shipbuilding plant without revamping.

A. Without that Western Pacific piece or revamping the yard, the portion the Oakland Dock people have now.

Mr. Neblett: That is all.

Redirect Examination

By Mr. Peckham:

Q. One question: The portion now owned by Oakland Dock and Warehouse Company the company used for shipbuilding and outfitting?

A. For shipbuilding.

Q. For repairs?

A. Yes, for repairs and outfitting.

The Court: Let me ask you something, Mr. Knapp. When you build a ship, the first thing you do, you build a hull and it comes off the ways, is launched. A. Yes.

Q. Then you stop to put on the superstructure

(Testimony of Sewell A. Knapp.)

and put in the interior everything that has to be done? A. That is right.

Q. Could those latter operations be done at this place? A. Yes, could be done.

Q. The only thing you couldn't do is make the hull and launch the hull?

A. Which is a pretty big portion of the work.

Q. What?

A. Which is the large portion of the work of building ships. [279]

Recross-Examination

By Mr. Neblett:

Q. Are you familiar with the condition of the yard, I mean the piers, the crane rails and tracks, I call them, and general condition of the machinery in the yard at this time? A. No, sir.

Q. What is the life of piers of the type that were built in this yard, do you know, Mr. Knapp, assuming that it was built of green piles?

A. I don't know how this yard is constructed, whether it was built of green piles or whether permanent piles under the floors and creosote, or not. I am under the impression those are creosoted, but I am not sure. I had nothing to do with the construction of the yard at all. I am not familiar with its present state.

Q. What is the general life of a yard of that type, the life, average life, before you can go to work?

(Testimony of Sewell A. Knapp.)

A. In the yard I am in now, we have piers there twenty and twenty-five years old and still using them.

Q. Just take the whole yard as it was built by the Maritime Commission there before the war, what is the general average life of a yard of that kind?

A. I don't know how the yard is built, if it was built as an emergency yard or if it was built for permanency. That is what I don't know. I had nothing to do with the building of [280] the yard itself.

Mr. Neblett: That is all.

The Court: Any further questions?

Mr. Peckham: Just one question.

Redirect Examination

By Mr. Peckham:

Q. Mr. Knapp, from your experience in ship-building have you ever known ships, that is, hulls to be launched and the superstructure and outfitting done at another place? A. Yes.

Q. That isn't an unheard of thing?

A. During the Second World War considerable of that was done.

Mr. Peckham: No further questions.

The Court: All right, step down.

(Witness excused.)

The Court: Any further evidence now on this matter?

Mr. Peckham: No, there isn't, your Honor. With the one suggestion that I may offer that folder in evidence.

The Court: Yes. Anything further in an evidentiary way from you, Mr. Neblett?

Mr. Neblett: I think I will have to recall Mr. Deede for a few questions. [281]

RALPH G. DEEDE

recalled by the Defendant, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Neblett:

Q. I show you a document dated April 8, 1949, and headed "War Assets Administration, Region 10, 1000 Geary Street, San Francisco 9, California; chronological summary of events since assignment of Moore Drydock Company, West Yard, Oakland, California, M-California-174, to War Assets Administration, Region 10 Office, for disposal," and ask you if you are familiar with that document, Mr. Deede? A. Yes, I am.

Q. That was prepared by your office?

A. That is correct.

Mr. Neblett: We offer this document in evidence, your Honor, on behalf of the Defendant.

Mr. Peckham: Well, I haven't objected to this proceedings because I know your Honor would like to have all the circumstances; but I fail to see the materiality or relevancy or competency of this document. It is a chronology of the events that led up to the, apparently, the acceptance of the Oakland Dock and Warehouse Company by them and the respective amounts of money that were paid.

(Testimony of Ralph G. Deede.)

The Court: Who made it?

Mr. Neblett: Made by Mr. Deede's office, made by his office here, the Regional office. [282]

The Court: I will admit it.

(Chronological summary of events, etc., was admitted into Evidence as Defendant's Exhibit F.)

Mr. Neblett: Referring to Defendants' Exhibit F, just admitted into Evidence, would you look at item 7,I, under that, and read it, will you please? That is Item 7,I.

A. "Moore Drydock Company, Oakland, California, offered to purchase for \$500,001, all cash on closing."

Q. That offer was made, according to this document on June 10, 1947?

A. I wouldn't know. I wasn't there at that time, but according to that document that is what is stated.

Q. June 10, 1947. A Security Clause wasn't on the property then, was it?

A. I wouldn't know. I wasn't there at that time. I had nothing to do with the yard, didn't know about it, but I am sure the Security Clause was not there because it was placed on there at a later date.

Q. That was part of the yard including the Western Pacific lease?

A. I wouldn't know.

Mr. Neblett: That is all.

Mr. Peckham: No questions.

(Witness excused.)

The Court: That is all the evidence now that you have [283] to offer?

Mr. Neblett: That is all.

Mr. Peckham: Yes.

The Court: All right, will you continue then, with your argument on the question of how these amendments to the deed affected conditions in the bill of sale? That is what I am interested in. As I understand your contention—is this a fact?—that the bill of sale refers to the quit claim deed, in a sense it was all one transaction, and that when the amended deed was made, since it enabled you to keep all the land and build what you wanted on it, it therefor was inconsistent with the provisions of the bill of sale, and therefore the provisions of the bill of sale were in a sense repealed, is that correct?

Mr. Neblett: That is correct, about as far as I have gone at the present time.

The Court: Yes.

Mr. Neblett: I haven't gone any further than that up to now. I handed your Honor the three instruments and the law with which we are concerned here and I would like to call your Honor's attention to the original quit claim deed, to start with. If your Honor will turn to page 3 of it, the Court will see that the so-called restrictions "and subject to the following covenants and conditions by the grantee herein to be performed," on page 28 of the direction of the Munitions [284] Board, all of that deed down to and including the words "War Assets Administration" in paragraph 15 on page 6 were stricken out and rewritten beginning with this mat-

ter on page 1, just ahead of paragraph 1 on the amendment or modification, "and subject to the following conditions and covenants by the grantor and the grantee herein to be performed." The word "grantor" is set in there, and that was set in, your Honor, it is perfectly obvious and the Government has an option to lease upon certain terms and conditions the facilities the Oakland Dock and Warehouse Company was building; and the reason the word "grantor" was inserted in there and the reason why the Oakland Dock and Warehouse Company was required to execute the modifications was to get away from the statute of frauds that would make the option to lease good by signing by both parties. In other words, all these restrictions amount only to an option to lease the property. I think that is generally conceded by everyone that has studied the question. Certainly that is the idea of the Department in Washington.

Now, we went in to ask, as I told the Court yesterday, that the Security Clause be removed entirely on the ground that it was void. That was the main point we made. But we felt—we considered very seriously bringing suit to quiet title, but we felt we were not able to bring suit to quiet title until such time as we had exhausted our administrative remedy under paragraph 3 of the old deed. So we went in under [285] that and the motion was denied and, as we pointed out to your Honor yesterday, the Munitions Board opened the door for us to come back and ask for modifications which were satisfactory to us. In the discussion that went on, it is perfectly

apparent from the deed that we came down, as shown by the article which I read your Honor the other day from the Munitions Board's report, made at the direction of the Secretary of Defense to Congress on April 1, 1950, we came down to the question of sites only, that is, the site for shipbuilding or a plant in time of war.

Your Honor will note that there are some very important things in this amendment which do not occur in the original. In the first place, it is apparent from the evidence that has been introduced here, and was apparent from the evidence which we had before the departments in Washington, that this plant had never actually been designated for disposal purposes such as in Public Law 883, and in order to set that question at rest for all time the Munitions Board redesignated this property, as shown by the evidence, as a terminal warehouse facility. It isn't designated now as a shipyard or shipbuilding plant. It is designated as a terminal warehouse facility, shown by the letter from Captain Christmas. So that is what we were talking about. That is what we were there for. We realized that there was no shipbuilding or ship repair, and we realized and fully discussed among ourselves—I don't [286] say that, I don't claim by what I am saying now that Admiral Klein, the officer who testified here yesterday and today, before ever agreed with us on anything. He said he didn't, and when he said that he was minimizing what the situation was. He never did agree with us. But this was made for the Munitions Board.

Paragraph 1 sets that at rest. This property, the site only, was designated. The machinery has never been designated but, "the granted premises hereinafter referred to as 'plant' constitute a part of the National Industrial Reserve under Public Law 883, 80th Congress, approved July 2, 1948, and have been designated for disposal subject to the provisions of the National Security Clause. This, and the following provisions constitute the National Security clause of this quit claim deed."

No question about that designation having been made by the Munitions Board which, according to the Secretary for Defense, is the body delegated by him to do this job.

Old paragraph 1, which was found to be unsatisfactory by the Munitions Board and by us, is that, "the above-described realty hereinafter referred to as the 'plant' is considered a War Reserve Plant and, as such, will be of vital interest to the United States of America in time of emergency."

That is no designation. That is just a recital of something. But this is a statement that it has been so [287] designated, and designated as what? The latter part of the deed shows it was designated as a terminal warehouse facility.

Now we go on. Here is something that I think the proof of the Government is absolutely lacking in. It is certain that no one has any authority here except the Secretary of Defense, and we see in paragraph 15 of the new deed that there is a lot of talk about secretaries and who has jurisdiction and who does not have jurisdiction in the old deed, whether

the Navy has or someone else. The Navy has no jurisdiction. Even though the old deed says the Navy does have jurisdiction, if your Honor please, you can't confer jurisdiction by consent nor can powers be conferred by consent. Nobody can confer—a body such as the Navy, or department of Government such as the Navy and a private person cannot confer jurisdiction on the Navy by contract. That is a well established principle. No necessity for my going into it. Public Law 883 places responsibility directly on the Secretary of Defense. Even the President of the United States hasn't under that law any power whatever over the Secretary of Defense's disposition any more than the President of the United States has any power over a decision of the Federal Court. None.

The Secretary of Defense is the appointed officer by Congress. The deed defines what "Secretary" means, and paragraph 14——

The Court: Are you talking about the regular deed or [288] amendment?

Mr. Neblett: The amended deed, your Honor.

Paragraph 14 defines that as "used in this agreement the term 'Secretary' shall be deemed to refer either to the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, and to their respective duly appointed representatives."

The only duly appointed representative—I don't know whether the Secretary of Defense has any authority, any power to delegate authority, but assume he has. He delegated to the Munitions Board. He did not delegate it to the Navy. There has been

no showing here, and that is an absolute break in the Government's proof, there has been no showing that the Secretary of Defense even knows about this suit, or that the Munitions Board knows about it. The only person that has been presented here as fostering this suit in the name of the United States of America is the Navy Department, and it has no authority because the Secretary of defense is the only one who can authorize it. Whatever the Navy has done about this thing would have no more effect that I could have done as an officer of the Army, which I was for a long time, and an Officer in the Air Forces.

Now, the modified quit claim deed, paragraph 2 in the old and the new deed are similar. That is the reservation that was in it for the twenty years. [289]

Paragraph three in the new and old deeds are similar, or about the same.

Paragraph four in the new and the old deed are somewhat different because they state that the dormant estate may be activated by the Secretary, meaning the Secretary of Defense "at any time prior to the expiration of the twenty-year period by written instructions to the grantee whenever, in the opinion of the Secretary, considerations of National Defense so require. In the event the dormant estate is so activated, the United States shall have the right to full possession and use of the plant."

Paragraph five is somewhat similar, but five is quite different. Five in the new deed: "When, in the opinion of the Secretary, it becomes necessary for the United States of America to utilize, in ac-

cord with the provisions of Public Law 883, 80th Congress, the productive capacity of the plant for the purposes of National Defense, the United States of America will undertake to negotiate a satisfactory contract with the grantee," and so forth. Why was that put in there in that way? Because no one can foresee at this time what kind of ships will be built in another war. Nobody can foresee that. So it is obvious that the Navy Department made its recommendations to the Munitions Board, which I have never seen. We were never favored with seeing that. And the Munitions Board finally granted and required they so amend [290] this deed, because it was much more desirable to them, to the Department of Defense, to have a live, going concern there which might be used for something such as warehousing, or such as the manufacture of guided missiles, or something of that sort.

It was known that the condition of the yard was very bad, and it was known, also, that the facility had been split into two parts. And there was grave doubt, and there is still grave doubt, whether the Western Pacific lease is void or valid and that the Government has no interest in that property whatsoever. Therefore, as Mr. Knapp testified here this morning, they had two pieces of property standing side by side, a cloud regarding title of the Government on that side, and a piece of property here, as Mr. Knapp says, that could not be used for shipbuilding unless the plant was entirely revamped. I forgot to ask him the question whether it is too small for a shipbuilding plant, but I suppose the

Court will take general notice of whether it is big enough in view of the other evidence in the case. But it could not be used, anyway. This half could not be used anyway without the Western Pacific lease without entirely revamping of it. Not for ship-building. That is the testimony of the Government's own witness.

Paragraph six in the old and new deeds are somewhat similar except that it says, "the grantee, upon receipt of written notice that the dormant estate has been activated, [291] will immediately proceed, subject to the availability of labor and materials, to remove improvements, structures, alterations, machinery and other equipment, in accordance with the directions and instructions in such notice. Such action will be completed in the shortest possible time but in no case in excess of 120 days from the date written notice is received."

There is a point. That was written so that the grantee's machinery would have to be taken off of there, after we have built up the plant, after we are allowed to build it up as a terminal warehouse facility. the Government wouldn't come in and tear down all this property and revamp this as a shipyard.

This is an acceptable document. So we state to your Honor today, having made a document in the highest good faith in which we had all these things we feel, which we contended throughout, as shown by the evidence in this case, that the provision of the bill of sale wouldn't matter, because without this support of the old quit claim deed there was no

way to activate it and it wasn't necessary to revise it. And that was apparent from the beginning. It is shown in the writings, shown in the affidavit of Mr. Agostini, that we have a contract and we are trying to carry out the contract and the Government is here trying to get an injunction against us from carrying out the contract made with us. We haven't breached the [292] contract. The Government has breached it by bringing this suit, and it is being brought by somebody that has no authority namely the Navy Department. I challenge the Government that the Secretary of Defense or the Munitions Board has had anything to do with this suit.

Mr. Peckham: The Attorney General is authorized to bring this suit.

Mr. Neblett: I would challenge the Attorney General to show it if I could. I can't challenge him. He isn't here. But Counsel for the Government represents the Attorney General.

Anyway, if the Court please, that is our situation. We have a contract we are trying to carry out, and we can't carry it out if they are going to allow the machinery, tools and equipment to clutter it up. The piers are falling in the water, settling down. The water lines have gone to piece high pressure air lines. Cranes, as Mr. Arnaud said, are settling so they can't be moved and they are both in the way and of no value to anybody.

That is the reason this was made in that form. We have to remove improvements, fixtures, alterations, machinery and other equipment. We have to remove it. Why not remove it now and build the

place up so that it will be of use to the community and the Government and then——

The Court: Your position is that this deed is inconsistent with the bill of sale, the second deed, and that therefore it [293] repealed the conditions and provisions that the Government is claiming still prevail in the bill of sale? That is in essence what you are claiming, isn't it?

Mr. Neblett: That is true, your Honor.

The Court: And having executed this amendment under conditions such as it was, then it made the conditions of the bill of sale *functus officio* and you shouldn't be required to carry it out.

Mr. Neblett: Your Honor has the correct understanding of our position.

The Court: Yes, I think I understand it. Have you anything to say on this subject, Mr. Peckham?

Mr. Peckham: I think so, your Honor. I would like to have some time to answer the arguments of Counsel. Counsel has had considerable time.

The Court: Yes, I understand that.

Mr. Peckham: Would you like me to begin now?

The Court: Well, if you prefer to wait until this afternoon it is all right with me.

Mr. Peckham: Well, perhaps——

The Court: I have to leave here at twenty-five minutes after three. I think you gentlemen, if you take that much time, will have had ample time on this discussion.

Mr. Peckham: Yes, I assure I won't take that much time.

The Court: I think I have some of these things drilled [294] into my mind.

Mr. Peckham: Your Honor, at this time I would like to offer in evidence the folders.

The Court: That is the one you referred to before?

Mr. Peckham: Yes.

Mr. Neblett: We have no objection to it, your Honor.

Mr. Peckham: Plaintiff's Exhibit next in order.

(The folder was marked Plaintiff's Exhibit 6 in evidence.)

The Court: Do you wish these documents back, Mr. Neblett?

Mr. Neblett: If your Honor wishes to retain them until the argument is completed——

The Court: Yes.

Mr. Neblett: I think that will be more efficient. We want them back after the case is over, that is all.

The Court: We will recess until 2:00 o'clock, but I want to leave here at twenty-five minutes after three.

(Thereupon this cause was adjourned to the hour of 2:00 o'clock, p.m.) [295]

Thursday, June 22, 1950, 2:00 o'Clock, P.M.

The Clerk: United States versus Oakland Dock and Warehouse Company, further hearing.

Mr. Peckham: Ready for the Plaintiff.

Mr. Neblett: Ready for the Defendant.

Mr. Peckham: Your Honor, may it please the Court, the principal issue to which Counsel has addressed himself in his closing argument is the question of the effect of the modification of the covenants and conditions of the original quit claim deed.

I believe your Honor is familiar with the Government's position that the proposed modification was a modification simply and solely of the original quit claim deed which has to do, though there were references incidentally to the personal property that was being conveyed by a separate instrument, executed at the same time, which had to do solely and exclusively with real property.

I think we ought to reorient ourselves and re-focus our vision of this entire transaction and the subsequent procedures that have followed.

Here we have a case, as testimony has shown and as Counsel has stated in his presentation from time to time, of a facility which was declared surplus being disposed of. It was known all during the time prior to this particular sale [296] that this particular facility was to be sold subject to the National Security Clause. There has been testimony that that fact was made known in the discussions that continued at the time of the purchase by the Oakland Dock and Warehouse Company.

Counsel has indicated from time to time how, after the sale took place, the Company, through its representatives has been attempting to have the National Security Clause lifted as to the entire property. They have made repeated attempts to have it—either have it lifted completely or, when that

failed, to have a modification. They desired to utilize the yard in a way that apparently was not permissible under the first quit claim deed apparently in order to, in balancing these factors, the factors of permitting the widest latitude in the use of the yard so that they might use it and have some economic advantage to them and the factor of the value of preserving the yard for the purpose of National Defense, the modification of the quit claim deed was permitted.

The modification of the National Security Clause as it affected the real property permits a certain use of the property as is shown in paragraph 9 of the modification. It states, "except as otherwise provided herein, the grantee, during the twenty-year period, may alter, improve, add to or extend any or all of the buildings and structures now on the property, erect additional buildings and structures on all or any part of the premises not now occupied by the permanent [297] buildings (main structural frame of metal, concrete or masonry) and the piers and replace any of the piers and nonpermanent buildings and structures with piers and buildings or structures having equivalent capacity."

It says "except as otherwise herein provided," they may do that. The first sentence of that same paragraph 9 in the modified quit claim deed says that "during the twenty-year period, the grantee will not make any alterations, improvements, additions or extensions to the buildings and structures or erect any new building or structure on the premises which would diminish the capacity or impair

the utility of the plant for the purpose for which it was designed, unless the plant can be restored to efficient operation for its designed purpose within not to exceed 120 days.”

So here from the first of the documents we see what was done. In an attempt to accomodate the Oakland Dock and Warehouse Company to utilize this yard for its economic advantage certain latitude was permitted. However, the policy that is imposed in the National Security Clause is preserved in this modification as to the real property. So that the National Security Clause is not only still in effect as to the real property but, as I will go on to show, it is still in effect as to the personal property sold under the bill of sale. There is nothing in the proposed modification or alleged quit claim deed which is a release of the conditions and [298] restrictions which are stated in the bill of sale. That subject which would be by the remotest implication an attempt to permit the Oakland Dock and Warehouse Company to utilize this yard (I take it for a terminal warehouse) was apparently in mind when this modification was made, but there is nothing in here which says they can sell off the tools or machinery, or that releases them from the conditions against disposing of the tools and equipment.

Should you take the view that Counsel advances, that this modification supersedes both the bill of sale and the original quit claim deed as to the imposition of the National Security Clause, I refer your Honor to paragraph 14 of the modification which defines the term “plant,” which is used

throughout the modified quit claim deed, and the term "plant" refers to "the property sold, conveyed and transferred hereunder and to any part or portion thereof."

That term, with that portion of paragraph 9 which states that the plant must be not—must remain in such a state that it can be put into action within 120 days for the designed purpose for which it was built would certainly not indicate that it was intended the machine tools and equipment, which are a vital part of the plant if it is to go into operation within 120 days, were—that is, was to be removed as to the equipment and machinery.

While we are talking about this, Counsel this morning [299] made a general assertion that the facility, the Oakland Dock and Warehouse Company plant there, had now been designated as a terminal warehouse. Well, there has been no evidence to that effect. He refers to a letter, which was admitted into evidence, from Captain Christmas to the Oakland Dock and Warehouse Company or its representatives. In that letter Captain Christmas simply referred to a conference he had with Mr. Mayock, Mr. Welburn Mayock, an associate of Colonel Neblett's, and states that Mr. Mayock made a suggestion that he submit a proposal to have the designation changed, and that in view of the suggestion that such a proposal was to be submitted, that Captain Christmas was either answering another letter or wasn't going to answer another letter.

In any event, it isn't a letter designating the yard

as a warehouse facility. In fact, in the report to Congress and the testimony and all the evidence presented the yard still remains designated as a ship repair or shipbuilding yard which is necessary in time of National emergency or National Defense.

Counsel has from time to time stated that the Department of Navy has brought this suit. Well, of course technically the United States Government has brought the suit and it has been brought through the local officials of the Attorney General of the United States. Then, Admiral Klein has testified as a competent and experienced officer in the United [300] States Navy whose business it has been for a great number of years—whose business it has been, the examination and planning of the ship yard facilities available for building ships in time of National emergency. We were fortunate enough to have Admiral Klein stationed here inasmuch as he has been in Washington in the Bureau of Ships at the time when planning mobilization, in which plans this particular yard played an important part, were formulated.

We were shown the designation of the plant in many ways, and the Department of Navy, being the Department of National Defense established, or the Department of Defense which is concerned with shipbuilding, is the one that makes the recommendation and the one to which the plant, when it is placed in the National Reserve, is assigned for the purposes of inspection and constant review as to requirements for National Defense. That recommendation was made by the Bureau of Ships and the

Department of the Navy, which has within its body the men who will be charged with the responsibility of defending this country in time of war at sea.

There have been constant assertions made by Counsel in the nature of substitution of his judgment as to what is needed in time of war. Now I think in a proceeding of this kind, your Honor, that we who are laymen, so to speak, in regard to matters of National Defense, must rely upon those officers and those bodies of the Government in the Department [301] of Defense, and including the Munitions Board, whose responsibility it is to determine what is necessary and who know the type of ships that are intended to be produced at the time of another emergency.

Just looking over some of these assertions made this morning by Counsel, there has been no determination here in this proceeding nor in any other proceeding that there is any cloud on the lease of the Government from the Western Pacific Railroad Company. As far as the Government is concerned, the yard can be used as a unit and the National Security Clause has been imposed on the yard to be used as a unit. Even if it couldn't be used as a unit, that was temporary only, and both yards could be used for outfitting and for ship repairing. Both could be considered essential in time of a National Emergency.

Counsel has referred from time to time to the reports of the Munitions Board. I would like to refer your Honor to the 1949 report in which—well, submitted April 1, 1949, in which there is consider-

able discussion of this particular plant and it is stated it is one of the best locations on the Pacific Coast for the purpose for which it was designed. This determination has been made by agencies of the Government whose business it is to make such determination.

Mr. Neblett: Pardon me, did I understand you to say, Counsel, that that was the 1949 report? [302]

Mr. Peckham: It is the April 1, 1949, report of the Munitions Board to the Congress, Plaintiff's Exhibit 3-A.

It speaks in the appendix, Exhibit 16 on page 239, it says that the Moore Drydock Company yards—it says, “maintained in National Industrial Reserve with full N.S.C. restrictions. Considered one of the best facilities on the West Coast for its purpose, necessary to maintain in the event of a future emergency.”

Counsel has made the point through questioning of witnesses—has attempted to make the point through questioning of witnesses and has made the point in his oral discussion, that the yard is, in effect, falling apart; that the piers of the yard are going to pieces, to use his language. Under the terms of the National Security Clause in both the bill of sale and the quit claim deed it is the responsibility of the Oakland Dock and Warehouse Company to maintain that yard. If it is going to pieces it is because the maintenance has not been adequate, and certainly the defendant company should not be permitted to take advantage of its own breach of

terms and conditions imposed upon the sale of this property in order to justify their position now that the yard would not be useful in National Defense because of the deterioration that they contend has taken place.

The recital in the first deed of trust——

The Court: You mean the deed, don't you? [303]

Mr. Peckham: Deed, yes, giving the power to activate the so-called dormant estate, the recital of the yard being a part of the National Reserve and giving the Secretary the power to activate the reserve, or, rather activate the dormant estate, was simply—it just as much pertains to the bill of sale, or, rather the same provision in the same modified quit claim deed that was found in the original deed as the designation of the plant and as the power of the Secretary to activate it in time of National Emergency would still be appropriate, taken together with the provision in the bill of sale where there was just a recital there to show that the object of the imposition of the National Security Clause in the sale of both types of property was to keep them as one unit. The whole general purpose of placing a plant that is not to be disposed of as surplus is to preserve it as a National Emergency so that it could be activated and put into operation within 120 days. Certainly, in order to do that it is necessary that machinery and machine tools, particularly the heavier type of machine tools, be kept available.

Yesterday when Mr. Arnaud was testifying as vice-president of the defendant company there was

considerable testimony about the prospective lease, which is not binding on either party, but is simply in the stage of negotiation, and there was testimony that the restraining order which was issued by your Honor has, to use Mr. Arnaud's words, put the kibosh on the negotiations. There is no reason that that [304] should have occurred. The Company is free to lease its property as it has been doing, subject to the National Security Clause. In any argument addressed or directed to balancing out the conveniences, there is certainly no detriment going to occur to the defendant company as a result of the continuation of the restraining order in the form of a preliminary injunction. They are free to go ahead and lease the property. The thing that they are not free to do is to continue to sell the large amount of machine tools that are listed in Plaintiff's Exhibit 5, which have been testified to as being so essential to the operation of the plant that the sale of a great proportion of those tools would materially reduce the capacity of the plant to produce what it is designed to produce.

Counsel has made considerable point of the delegation of authority, and I am not yet clear exactly how he objects to the designation or delegation that has taken place. There is in the—once again referring to the report of Congress of April 1, 1949, on the National Industrial Reserve, there is set forth in the appendix as Exhibit 19, page 267, part three of the regulations under which the Munitions Board operates, and the title of part three is "Delegations of Authority," and there is there set forth the

entire delegation of authority, with reference to the appropriate section of the Federal register where the delegation made by the Secretary of Defense Forrestal to the Munitions Board of his duties under the National [305] Industrial Reserve Act. That is 13 Federal Register 4576.

The Court: That is August, 1948, isn't it?

Mr. Peckham: I believe this was made the day after the Act, July 3, 1948.

Then there is also contained in the United States Code the provisions establishing the Munitions Board, Title Five, 171-H of the United States Code, Annotated.

There are set forth the powers and duties and functions of the Munitions Board, and also provisions establishing it, and it states here——

The Court: What volume is that?

Mr. Peckham: Title Five, Section 171-H.

“The Board shall be composed of a Chairman, who shall be the head thereof, and who shall, subject to the authority of the Secretary of Defense, and in respect to such matters authorized by him, have the power of decision upon matters falling within the jurisdiction of the Board, and an under-secretary or assistant secretary from each of the three military departments, to be designated in each case by the Secretaries of their respective departments.”

Once again, it states here: “(c)”——this is Section 171(c), “Subject to the authority and direction of the Secretary of Defense, the Board shall perform

the following duties in support of strategic and logistic plans and in consonance with guidance in those fields provided by the [306] Joint Chiefs of Staffs, and such other duties as the Secretary of Defense may prescribe," then enumerates such duties and functions, much of which pertains to the planning for military aspects of industrial mobilization and such problems as those with which we are not concerned.

This would come within the jurisdiction of the Munitions Board in that regard.

As to Counsel citing the Kansas City Stockyard cases, Morgan against United States, those cases arose out of proceedings taken by the Secretary of Agriculture pursuant to appropriate action to fix rates. Those were in the nature of quasi-judicial proceedings of an administrative nature. Those procedures affected existing property rights of persons at the time of adjudication by the Secretary or by his representatives. They were questions as to whether or not statutory procedures were followed, and led to whether or not due process was accomplished by the way in which decision was ultimately made by the Secretary, and that there was no oral argument before him until some other time. The real point is that when the determination in this case was made it did not at the time it was made affect any property rights of Oakland Dock and Warehouse Company. It was made long prior to the time that they bought this yard. It affected the yard, but at the time that it was owned by the United States.

And pursuant to the provisions of the Constitution, [307] Article Four, Section Five, which states it is an exercise of Constitutional Power of the Federal Government to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, the same question does not arise that arose in that particular case. It is an entirely different matter in that there wasn't a quasi-judicial proceeding of an administrative nature herein.

The Court: What have you to say as to that point that they make that the amendments to this quit claim deed were such that they excluded the possibility of the use of these machine tools and cranes, and so forth, on the ground, and that therefore they sort of by implication repeal the conditions in the bill of sale?

Mr. Peckham: Well, I would go back again, your Honor, to Section 9 of the modification which shows that they would not make any alterations, improvements, additions, or extensions to the buildings and structures which would diminish the capacity of the—diminish the capacity or impair the utility of the plant for the purpose for which it was designed unless the plant could be restored to efficient operation for its designed purpose within not to exceed 120 days.

In other words, they were permitted to make certain changes and alterations, but they were limited in making those by that provision in this way, that they couldn't so radically change it that it couldn't be restored in 120 days. I believe even

the conditions of the original quit claim deed contain [308] a provision that they might move the machine tools around, but they could not dispose of them or by dismantling them, moving them around, reduce their use; but, in other words, that they were—the main intent, of course, of these instruments was to keep the yard in such a way that it could within 120 days be put back together again and restored and used for the purpose for which it was designed.

Your Honor I know is very familiar with the evidence in the case. I don't think it is properly a matter for me to recite the evidence that has been produced, that would go to a consideration of the different factors that must be weighed when a decision is made as to whether preliminary injunction will issue.

As we have said many times during these proceedings, the question of the adequacy of our remedy at law is not one to be considered from a monetary point of view. For that reason I did not examine the accountant at any great length on the financial responsibility of the corporation. The question is whether or not the Plaintiff—whether or not the machine tools that have been sold——

The Court: I understand that.

Mr. Peckham: ——could be restored in 120 days.

The Court: I am wondering about one thing, that is, the provisions in the bill of sale, I think they prescribe a limit of ten and twenty years, don't they? [309]

Mr. Peckham: Twenty years on the personal property.

The Court: Well, the only point that is bothering me is that if sufficient time elapses from the time—if sufficient time elapses, some of the machines and tools might be obsolete and might not perform the function that they were originally intended to perform, or may be superseded by other better equipment so that the plant would have to be rehabilitated and new tools used and these discarded. Of course there is nothing said in these documents about it, but there was some testimony to the effect that the underpinning of some of these railways for the cranes is really no good any more, damaged by water and rotted, and they really couldn't serve their purpose anyway, and therefore the cranes that are used on them wouldn't serve their purpose, either, and therefore these violations against the inhibitions against the sale wouldn't be hurtful to public policy anyway.

Mr. Peckham: Well, your Honor, in that regard the Bureau of Ships has been assigned the responsibility of making an annual inspection to determine the condition of the yard. Also in that regard, there are contained in the regulations of the Munitions Board in this report to Congress of April 1, 1949, at page 298, Section 3, Sub-section 3-601, "Whenever the Munitions Board shall determine that the retention of the productive capacity of an excess industrial property in the National Industrial Reserve (including a lesser part or [310] interest than the entire property) is no longer essential to the

National Security, it will authorize the relinquishment or waiver of a part or all of the provisions of the National Security Clause applicable to such property.”

They have a procedural remedy there with the Munitions Board to have the National Security Clause lifted at such time as they can establish this deterioration has reached a point where it wouldn't be usable in case of National Defense, and if by itself could take the initiative and so waive the National Security Clause.

Then I might go on further on that point, your Honor, to say that apparently despite the great deal of negotiation that has been going on prior and subsequent to the purchase of this property in Washington, that the Oakland Dock and Warehouse Company, when they were not able to have the National Security Clause lifted as to the personal property, became so impatient in their effort to dispose of it that they desired to go—that they went right ahead and started selling the property without getting any, either judicial or certainly not administrative, determination that they were relieved either because the yard had deteriorated or because of modification of the covenant. They chose to go ahead and sell off this property.

There has been considerable testimony here as to the value of the yard. Mr. Deede testified that the value placed upon the yard without the National Security Clause was [311] \$2,600,000; that this company was able to purchase this yard for \$1,200,000, approximately. Certainly the cannibalization in the

selling of the yard piecemeal, in view of the fact that the Government has already paid for this National Security Clause by a \$1,400,000 reduction, and proportionate reduction in regard to the personal property, I submit, your Honor, that certainly that would, I think, somewhat shock the conscience of the chancellor in an equitable proceeding. In regard to the balancing of the conveniences, the detriment here is a detriment to the public. The cannibalization of this plant would be detrimental to the country in case of a National Emergency. There is no benefit to the public by not granting the injunction. There are those cases, as your Honor knows, where a nuisance is attempted to be enjoined. Oftentimes if circumstances are such that the public would be harmed by closing down of a great plant because of inconvenience or detriment to one individual, equity will not grant an injunction. But here we have the reverse situation. If the injunction is not granted the public will be harmed and of course the corporation will not be benefitted. And in this case where they have already, in a sense, been paid for the National Security Clause, no great detriment is being imposed. They are free to go ahead and lease their property to Lyco or get other leases. All the Government asks is that they comply with the provisions of the National Security Clause. [312]

Well, there are a great many other things that Counsel has said from time to time that I could comment on, but I think probably your Honor by this time has the situation in mind.

The Court: I should have.

Mr. Peckham: If there is any question you would like to ask?

The Court: No. Have you anything further to say now on this subject, Mr. Neblett?

Mr. Neblett: Just one short statement, your Honor.

I think that Counsel was in error when he claims that something about the delegation of authority and this setting forth of it has been done here. We do not claim, of course, that the Munitions Board does not under the new law adopted in 1947—not 1949, not the rule that Counsel read from—adopted in 1947 can be delegated authority to fix these plants, but it couldn't have been done in 1948 before the adoption of these amendments.

But the main thing I wish to address my remarks to at this time, following up what I said, is that it is obvious from this agreement, modified as it was on February 28, 1948, with the concurrence of the Department of Defense acting through the Munitions Board and with instructions to the G.S.A. on Geary Street, the Regional Office, that the thing the Munitions Board was interested in was the site and the site only. I hope your Honor will pardon me for going back to the document which was introduced in Evidence by Counsel for the Government. I refer now——

The Court: That is the 1950 report?

Mr. Neblett: Yes, your Honor.

This was made about the time that this deal was put through. I might say to your Honor with some

fear and trepidation that I may be claiming too much credit for that, but I would say that the work that Mr. Agostini, president of his company, and the work which I did as Counsel of this company back there in Washington trying to get this modification over, and finally succeeded in getting it so it was satisfactory to everybody with respect to the entire plant, I had a great deal to do with the change in attitude upon the part of the Munitions Board.

Now, if Counsel had read the entire thing about the Moore Yard in the 1949 report in which it is said to be a fine facility, one of the best, but there is an asterisk there and down at the bottom of that page is "not inspected." Somebody was just writing about it back there. It wasn't inspected. But after an inspection had been made, after it had been brought to their attention the condition of the shipyard, the policy was established by the Munitions Board, this report was filed with Congress on March 14, just 14 days after this quit claim deed as modified was executed. By that time it had changed. Everything had changed. Reading this again, it told about shipyards and their difficulties: "Recognizing that problem in connection with shipyards, most of the plants have been cannibalized of production equipment. Most of the plants have been cannibalized of production equipment" at this time. It must be that they didn't think the equipment would be useful in future emergency to build the type of ships that they designed. "And the land, docks and more adaptable buildings have been leased

to a number of tenants for a wide variety of peace time activities. This at least provides for a certain degree of maintenance and some offset of expense to the Government. A suitable modification of the Security Clause provides for recapture of the sites in the event of an emergency.”

I contend that that was the theory upon which this deed was modified. The Government cared nothing about the equipment, only the Navy. I hope my friends in the Navy, of whom there are legion, will excuse me for saying that that was nothing but an exemplification of an understanding that goes into every professional service. They hoard everything. Once they get their hands on something they do not desire to turn loose, and that was the reason this was put into the hands of the Secretary of Defense.

The Court: Like the man in South Pacific, “Once you have her don’t let her go.” [315]

Mr. Neblett: I think that is an apt illustration, your Honor.

And it goes on, “unwarranted expense would be involved in the idle maintenance of shipyard facilities—” that is exactly what the Navy would like to have us do. I can say to your Honor, and I am not in fear of any contradiction, if the Munitions Board were here in this suit that they would stand by what is written down here, and the Navy Department really has nothing to do with it except that they are in a recommending capacity. That is what the Navy would like to have us do, just let that old stuff sit there, sink in the water, go to

pieces, worth nothing to anybody, and just let us pay taxes on it to the State and County, to the State of California and County of Alameda. Your Honor knows that from just taking judicial notice of it, of the fact that taxes ruuing over a period of ten years would be more than we paid for it.

The Court: The only answer I can make to that is, why did your client take it?

Mr. Neblett: I beg your pardon, your Honor?

The Court: The only answer I can make to that is, why did your client take the property?

Mr. Neblett: Well, they took it on the theory——

The Court: I don't mean the real estate, I mean the personal property.

Mr. Neblett: Well, why they took it was very simple, [316] because in paragraph 3 in the quit claim deed we were given the right to apply for modification of that any time, for modification or for removal of it, and we were sure when we could bring in the evidence that it should be modified, that it would be granted, and that is exactly what happened. That was a part of our contract, that we could apply at any time. We could apply next day. And we did that and they made this modification which is satisfactory to everybody.

“Assuming that there might be quite different requirements in a future emergency, considerable alteration in both layout and facilities may be required. With a suitable waterfront site available”—which it has. There was testimony this morning it couldn't be used for shipbuilding unless there was considerable revamping, which we all know—

“at least one of the major delays in establishing a shipbuilding facility will be eliminated by retention of title or lease, regardless of the disposition of buildings and equipment.”

There is another point I have referred to before, but it is something that has come up so much and seems to be in the case, that the whole Industrial Reserve is dependent upon the decision in this case. That is incorrect. The only thing involved here is the machinery and tools and equipment because the Security Commission has sustained it is just figuring on the site. What do we have now? With that lifted, eliminated from the quit claim deed in which the Security Clause in the [317] old quit claim deed provided that Security Clause would be held in the machine tools and equipment on the plant for ten years, it provided for activation of the old things. That is gone. That isn't there any more. And there is no way to activate that Security Clause with regard to the machine tools and equipment, and the Government could come in tomorrow and take over that plant if we had an emergency. Couldn't do it unless we had an emergency, but could come in tomorrow and make us move under the terms of that quit claim deed, every one of those cranes off of there. Of course the Government would pay us for moving them, but we would have to move them off. They are not useful to anybody now. Anybody knows that in modern war, if war comes, none of that stuff will ever be used again for any purpose. We heard General Bradley come out a month ago, make a speech in which he says

that. I listened to a speech by General the other night in Santa Barbara and he said the same thing. I heard General Vandenberg over the radio and then Admiral Sherman's talk that none of these things will be used any more.

The Court: I am glad you mentioned an Admiral in that group.

Mr. Neblett: Admiral Sherman? I had to mention him. Because he made a remark the other day that we had a new torpedo which has a range of about sixty miles and has one of these guided fuses on it that has done away practically [318] with surface ships and we would have to go to undersea craft.

The Court: I was hoping you would mention Admiral Denfield, too, but you didn't.

Mr. Neblett: Admiral Denfield? I don't know Admiral Denfield very well. I do know Admiral Sherman very well. I hope your Honor will pardon me for making this comparison, but I think Admiral Sherman is more acquainted with modern ideas than Admiral Denfield because Admiral Sherman and I are both pilots. I am one, too. Air Forces.

The Court: I didn't want to interrupt your argument.

Mr. Neblett: You didn't interrupt me, your Honor. I am glad to have some humor injected into it. I would like to do it myself if I knew how.

Now, we have a case here that—we have a case where there is nothing that the Government could do to activate the machinery that is on that yard under this modified quit claim deed. Of course, if

you stand on the bill of sale as it was with all the Security Clause, there is nothing to activate there now. That one clause in there about resale upon which this suit is fastened is, under all the cases, invalid. And I think we were talking the other day of the case where the Federal rule applies——

The Court: You read that opinion.

Mr. Neblett: I am not going to read it. Dr. Niles Medical Society case, that has already been read.

And I close my argument and thank you very much, your Honor, for the courtesy that has been extended to us.

The Court: I have been very glad to hear you. Submitted?

Mr. Peckham: I think so.

The Court: I will take it under submission. I will keep the temporary restraining order in effect until I decide it, and I will try to decide this thing next week.

Mr. Neblett: Very good, your Honor.

Mr. Peckham: Thank you.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 320 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ RUSSELL D. NORTON,

/s/ KENNETH J. PECK.

[Endorsed]: Filed July 17, 1950. [320]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint:

Contains Exhibit 1, Exhibit 2, Points and Authorities in Support of Temporary Restraining Order and Order to Show Cause and Affidavit of John Rauly in Support of Application for Temporary Restraining Order and Preliminary Injunction.

Temporary Restraining Order and Order to Show Cause.

Answer.

Motion to Dismiss Complaint.

Counter-Affidavit of Jules J. Agostini, Jr., in Reply to Affidavit of John Rauly:

Contains Quit Claim Deed dated June 1, 1949, Exhibit 1, Chattel Mortgage dated June 1, 1949; Exhibit 2, and Modification of Covenants and Conditions of Quit Claim Deed; Exhibit 3.

Order Denying Motion to Dismiss and Granting Motion for Temporary Injunction.

Notice of Appeal to the Court of Appeals Under Rule 73 (B).

Designation of the Parts of the Record to Be Printed on Appeal.

Points Appellant Will Make on the Appeal.

Findings of Fact, Conclusions of Law, and Interlocutory Decree of Injunction.

Counter Designation of the Record on Appeal.

Reporter's Transcripts:

Vol. I for June 16, 1950;

Vol. II for June 20, 1950;

Vol. III for June 21, 1950;

Vol. IV for June 22, 1950.

Plaintiff's Exhibits Nos. 1, 2, 3-A, 3-B, 4, 5 & 6.

Defendant's Exhibits Nos. A, B, C, D, E & F.

Court Exhibits Nos. 1 and 2.

And I further certify that on July 17, 1950, a Cost Bond for \$250.00 was filed by the Appellant with the Notice of Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of August, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12,653. United States Court of Appeals for the Ninth Circuit. Oakland Dock and Warehouse Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 16, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12653

OAKLAND DOCK & WAREHOUSE COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

POINTS ON WHICH THE APPELLANT
WILL RELY UPON ITS APPEAL

1. The Complaint does not state a cause of action for damages or for an injunction.
2. The temporary injunction is void on the face of the record. The defendant and appellant is enjoined from the sale of any machinery tools and equipment without the written consent of the Secre-

tary of the Navy. The Secretary of the Navy is a stranger to this transaction both under Public Law 883, 80th Congress, and the contracts made under it. All authority by the Act and by the contracts is vested solely in the Secretary of Defense.

3. The temporary injunction was granted for the purpose of preventing an alleged breach of contract.

4. The plaintiff and appellee is attempting to maintain this suit without using or exhausting the administrative remedies provided in the contract.

5. The covenant against resale in a bill of sale is an unlawful restraint on alienation and void.

6. The suit was brought without the consent or authorization of the Secretary of Defense.

7. The security clause, if any, upon the machinery tools and equipment was removed February 28, 1950, by modification of the clause on that date so as to eliminate the personal property from the clause.

8. There is no evidence to support the finding of fact that the covenant against resale is not void as an unlawful restraint on alienation or that such a covenant or restraint is authorized by the provisions of the National Industrial Reserve Act of 1948, 62 Statutes, 1225.

9. There is no evidence to support the finding of fact that the California law covering restraints on alienation does not control the transfer of the machinery tools and equipment involved.

10. There is no evidence to support the finding of fact that the further sale and disposition of said machine tools and items of industrial equipment will materially reduce the capacity of the plant to produce the items for which it was designed, nor is there any evidence to support the finding that such further sale and disposition of the machine tools and equipment will frustrate or subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948 or that such sale or sales would cause irreparable or any damage to the plant.

/s/ WILLIAM H. NEBLETT,
Attorney for Defendant and
Appellant.

[Endorsed]: Filed October 25, 1950.

APPELLANT'S BRIEF

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 12653

OAKLAND DOCK AND WAREHOUSE COMPANY,
a Corporation,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION, GRANTING AN INJUNCTION
HON. HERBERT W. ERSKINE, *Judge*

WM. H. NEBLETT,
615 Latham Square Bldg.,
Oakland, Cal.,
Attorney for Appellant.

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IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12653

OAKLAND DOCK AND WAREHOUSE COMPANY,
a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

This is an appeal from an interlocutory order of the United States District Court for the Northern District of California, Southern Division, granting a temporary injunction *pendente lite* (R. 83 and 97).

JURISDICTIONAL STATEMENT

A complaint was filed June 8, 1950, in the District Court by the United States, plaintiff, against appellant, Oakland Dock and Warehouse Company, a California corporation, defendant (R. 2), alleging damages for the sale by appellant "without the written consent of the Secretary of the Navy" of certain machinery, machine tools and equipment purchased by appellant from the Government June 1, 1949, alleged in the complaint to be subject to a national security clause. The complaint also prayed for a temporary and permanent injunction. The national security clause alleged in

the complaint was authorized by the National Industrial Reserve Act of 1948, Public Law 883, 80th Congress, approved July 2, 1948 (50 USCA, Sections 451-462). The Act is quoted in full in Appendix A to this Brief.

A preliminary restraining order was issued on the complaint and the affidavit of a Navy employee. Appellant was directed to appear and show cause at the time fixed in the restraining order (R. 34) why it should not be enjoined during the pendency of the action from selling any more of its machinery, machine tools and equipment "without the written consent of the Secretary of the Navy".

The complaint alleged (R. 2) that the District Court had jurisdiction of the action pursuant to Title 28 USCA, Section 1345.

Appellant opposed the order to show cause for a temporary injunction by motion to dismiss the complaint (R. 36-39), answer (R. 34-35) and counter affidavit (R. 40-81), and by evidence introduced on its behalf. The order to show cause came on for hearing June 16, 1950, at which time the parties presented their pleadings and affidavits, together with oral and written evidence (R. 100-394). The lower court took the matter under submission, June 22 (R. 394), and on July 13 (R. 83-85) granted a temporary injunction enjoining appellant from further sales of its machinery, machine tools and equipment during the pendency of the action "without the written consent of the Secretary of the Navy". Appellant perfected its appeal July 17, 1950 (R. 85-90). This court has jurisdiction of the appeal under Title 28 USCA, Section 1292(1).

STATEMENT OF THE CASE *

In 1940-41 (R. 207-214 and 221) the Government condemned some 52 acres of land on the Oakland Estuary, Oakland, California. About the same time Moore Drydock Company, an old and long established shipbuilding company at

* Italics ours unless otherwise indicated.

Oakland, leased from Western Pacific Railroad Company approximately 45 acres of land adjoining the easterly side of the 52 acres. The Government built a shipyard on the two parcels. The ways were put on the Western Pacific leased land; the outfitting part of the yard, on the 52-acre Government-owned section. From 1941 to the end of the war, Moore Drydock Company, under a contract with the Maritime Commission, operated both the leased and Government-owned sections of the shipyard as one shipbuilding plant. In 1946 the shipyard was declared surplus and turned over to the War Assets Administration for disposal under the Surplus Property Act of 1944 (50 USCA, War Appendix, Sections 1611-1646). Moore Drydock Company assigned the Western Pacific lease to War Assets Administration.

Before and after July 2, 1948, the effective date of the National Industrial Reserve Act of 1948, War Assets Administration made numerous efforts to sell the whole yard but was unable to do so because no purchaser appeared who was willing to assume the restoration provisions contained in the Western Pacific lease (R. 360, Dft's. Exhibit F). Early in 1949 War Assets Administration made a public offering of the Government-owned or outfitting section of the shipyard, consisting of the 52 acres, with the machinery, machine tools and equipment thereon. Appellant was the successful bidder and the award was made to it, April 11, 1949. The sale was confirmed by letter of intent from the Government to appellant, dated May 27, 1949 (R. 203). The letter of intent was introduced in evidence by the Government as Plaintiff's Exhibit 1, and is incorporated in this brief as Appendix B. The Government retained the Western Pacific lease, the eastern half or building section of the shipyard, and the machinery, machine tools and equipment thereon.

The letter of intent provided for the sale to appellant of the Government-owned section of 52 acres, together with

the machinery, machine tools and equipment thereon for \$1,201,500. The letter of intent acknowledged receipt from appellant of a cash payment of \$240,300 and provided that the balance of the purchase price of \$961,200 was to be represented by appellant's promissory note, payable in 20 equal annual installments of \$48,060 each with interest at 4%, secured by a deed of trust on the land and a chattel mortgage on the machinery, machine tools and equipment. Possession of the plant was given appellant June 1, 1949. Pursuant to the letter of intent, War Assets Administration, on June 1, 1949, conveyed and transferred the land to appellant by quitclaim deed (R. 52-65), and the machinery, machine tools and equipment by bill of sale (R. 7-12). At the same time appellant executed and delivered to the United States a promissory note for \$961,200, together with a trust deed and chattel mortgage (R. 66-73) securing its payment.

The land and personal property were sold and conveyed to appellant *subject to a national security clause* which appears in the quitclaim deed only (R. 59-64). The national security clause in the quitclaim deed was made applicable to the personal property by reference to it in Paragraphs 1 and 2 of the bill of sale (R. 9). Authority for the security clause and the designation of the Secretary of Defense as the officer empowered and directed to administer the National Industrial Reserve are found in the National Industrial Reserve Act of 1948, Title 50 USCA, Sections 451-462 (Appendix A hereto).

The Munitions Board, which appears throughout this case, is a body "*established in the Department of Defense*" (5 USCA, Section 171h). On July 3, 1948, the *Secretary of Defense delegated his powers under the National Industrial Reserve Act of 1948 to the Munitions Board* (13 Federal Register 4576). Pursuant to paragraph 3 of the quitclaim deed (R. 59), appellant made application to the Munitions Board to modify the security clause on its property. The

Board approved appellant's application. *The clause was so modified, February 28, 1950, (R. 73-81) as to free appellant's machinery, machine tools and equipment from it.* The clause as modified remains on the land and its appurtenances *only* (R. 73-81).

Acting under the modified security clause, and Paragraph 9 of the letter of intent (Appendix B hereto), and Paragraphs 2 and 3 of the chattel mortgage (R. 68), appellant made seven separate sales to third persons of different lots and items of its machinery, machine tools and equipment (R. 40-52). Notice of such sales was given to General Services Administration, successor to War Assets Administration (Federal Properties & Administrative Services Act of 1949, Public Law 152, 81st Congress, effective July 1, 1949, Title 41 USCA, Sections 201-274). The parts of this Act, 41 USCA, Section 233(a)-(f), which are applicable to the disposal of surplus property are quoted in Appendix C of this brief. As required by Paragraph 9 of the letter of intent and paragraphs 2 and 3 of the chattel mortgage (R. 68), *appellant paid the Government the release prices fixed by it for all of the machinery, machine tools and equipment sold.* General Services Administration then *gave appellant written releases from the chattel mortgage covering all the items sold by appellant.* The releases have been recorded in the County Recorder's Office at Alameda County, California (R. 40-47).

This appeal is from the interlocutory order of the lower court granting a temporary injunction restraining *appellant from making further sales of its machinery, machine tools and equipment during the pendency of the action "without the written consent of the Secretary of the Navy"* (R. 84 and 97). After this appeal had been perfected (R. 85-90) to the order granting a temporary injunction, the Government appeared in the lower court and obtained another and second order granting a temporary injunction (R. 90-98). Appellant does not know the purpose of the

second order. Except for certain refinements in drafting, the findings of fact, conclusions of law, and temporary injunction are the same in both orders. The record shows (R. 85-90, 98 and 397-399) that the intent and purpose of appellant is to appeal from the interlocutory order of injunction granted in this case whether it appears in the first or second order, or in both of them.

QUESTIONS PRESENTED BY THIS APPEAL

1. Is the temporary injunction, prohibiting the appellant from selling or otherwise disposing of, *pendente lite*, “*without the written consent of the Secretary of the Navy*,” machinery, machine tools and equipment which appellant had purchased from the Government, subject to a national security clause *formulated by the Secretary of Defense* pursuant to the direction and authority given him by the National Industrial Reserve Act of 1948 (Appendix A of this Brief), *void on the face of the record*, where the complaint alleges and the affidavit in support of the injunction states, and the answer and counteraffidavit deny, and the lower court finds and concludes, that the Navy Department and its Secretary have jurisdiction over such chattels and that they cannot be sold or disposed of “*without the written consent of the Secretary of the Navy*”?

2. Can the Government maintain a suit involving a contract with a citizen made pursuant to the National Industrial Reserve Act of 1948 without alleging and proving that the suit was authorized by the *Secretary of Defense* on whom and no one else Congress has conferred all authority, powers, and duties under the Act?

3. Does the *Navy Department* or its Secretary have any authority, powers, duties, or jurisdiction in connection with or over property selected by the *Secretary of Defense* from excess industrial property for the National Industrial Re-

serve and sold and conveyed, under his direction, by War Assets Administration, or its successor in function, General Services Administration, *subject to a national security clause?*

4. Are not *all of the authority, powers, and duties over and in connection with the National Industrial Reserve Act of 1948 together with contracts made by the Government affecting it vested by the National Industrial Reserve Act of 1948 in the Secretary of Defense?*

5. Does *a release or modification of a national security clause in a specific case, approved by the Munitions Board to which Board the Secretary of Defense has delegated his authority, powers, and duties under the National Industrial Act of 1948, when executed by General Services Administration at the Board's direction, bind the Navy Department and its Secretary as well as all other units and officers subordinate to the Secretary of Defense?*

6. Do *written partial releases, executed by General Services Administration, from a chattel mortgage, held by the Government as security for the purchase price of machinery, machine tools and equipment sold appellant, subject to a national security clause, which has been removed from such machinery, machine tools and equipment at the direction of the Munitions Board, terminate all interest of the Government in the chattels released?*

7. Could the Government *maintain this suit, or apply for an injunction, or the lower court grant one, until it was alleged and proved that the Secretary of Defense or his delegate, the Munitions Board, had exhausted the administrative remedies, authorized by the National Industrial Reserve Act of 1948, and provided for in the national security clause which is a part of the contract between the parties, executed by the Government and the appellant?*

SPECIFICATION OF ERRORS RELIED UPON

1. The lower court erred in denying the motion to dismiss the complaint.

2. The lower court erred in granting the temporary injunction.

3. The lower court erred in its findings of fact of which the following are the particular specifications:

(a) In finding that the national security clause, applicable to appellant's machinery, machine tools and equipment, was contained only in the bill of sale without making a finding as to the effect of the reference therein in paragraphs 1 and 2 to the national security clause on the plant, including the machinery, machine tools and equipment, which clause appears only in the original quit claim deed; and in finding by inference that the subsequent modification of this original national security clause had not removed the clause from appellant's machinery, machine tools and equipment (Findings III, R. 92, and IX, R. 95).

(b) In finding that the Navy Department has jurisdiction over appellant's machinery, machine tools and equipment under the National Industrial Reserve Act of 1948 and the National Security Act of 1947, as amended in 1949, and the contracts made pursuant thereto; and that the appellant has, in violation of these Acts and contracts, sold and disposed of some of its machinery, machine tools and items of industrial equipment "without the written consent of the Secretary of the Navy"; and appellant will, unless restrained by the court, make other sales "without the written consent of the Secretary of the Navy"; and that further sales "without the written consent of the Secretary of the Navy" will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948 (Findings V and VI, R. 94-95).

(c) In finding that there was an obligation on the part of the appellant to replace the machinery, machine tools and

equipment already sold and all of such chattels as might be sold in the future “without the written consent of the Secretary of the Navy” in which findings the court did not take into consideration or make any finding thereon that the national security clause had been removed from all of appellant’s machinery, machine tools and equipment by the subsequent modification of the clause (Findings VI and VII, R. 94-95).

(d) In finding that the United States had been damaged by the sales of the machinery, machine tools and equipment already made “without the written consent of the Navy” and that the Government will suffer irreparable damage from all future sales, which may be made “without the written consent of the Secretary of the Navy,” unless restrained by the court from so doing (Finding X, R. 96).

(e) The lower court omitted to find that the national security clause had been modified February 28, 1950 (R. 73-80) and that the modification had removed the national security clause from appellant’s machinery, machine tools and equipment.

(f) By omitting to find that the written partial releases from the chattel mortgage, after payment by the appellant to the Government of the fair value of the chattels sold, terminated all interest of the Government in such chattels and because of that fact the Government’s claim for damages for the chattels sold “without the written consent of the Secretary of the Navy” was without basis in fact.

(g) By failing to find that the Government could not maintain this action because neither the Secretary of Defense nor his delegate, the Munitions Board, had made any attempt, before bringing this suit, to exhaust the administrative remedies authorized by the National Industrial Reserve Act of 1948 and provided for pursuant to the Act in the national security clause contained in the modified quit-claim deed.

(f) In finding (R. 96) that the Navy Department and its

Secretary, who are strangers to the National Industrial Reserve Act of 1948, had any authority, power or duties under the Act, and in omitting to find that all of the powers under the Act are conferred by The Congress upon the Secretary of Defense and his delegate, the Munitions Board, to which Board the delegation was made by the Secretary of Defense subject to his direction, authority and control.

4. The lower court erred (R. 96-97) in its conclusions of law by concluding that the appellant's machinery, machine tools and items of industrial equipment are still a part of the national industrial reserve and are in the possession of the appellant subject to a national security clause—appearing only in the bill of sale, without reference to its modification, removing the clause from the chattels sold and transferred to appellant by the bill of sale—within the meaning of the National Industrial Reserve Act of 1948 and that the Government was entitled to a temporary injunction restraining the appellant from selling any more of such chattels “without the written consent of the Secretary of the Navy.”

5. The lower court erred in granting the temporary injunction on the foregoing erroneous findings of fact and conclusions of law, and in granting any injunction based upon the “written consent of the Secretary of the Navy,” an officer upon whom the National Industrial Reserve Act of 1948 confers no authority, powers or duties, and to whom no delegation has been made by the Secretary of Defense of his authority, powers and duties under the Act.

ARGUMENT

SUMMARY OF ARGUMENT

POINT I, INFRA

Where Congress has vested in the Secretary of Defense all of the authority, powers and duties to be exercised and performed under the National Industrial Reserve Act of

1948 (50 USCA, Sections 451-462), which Act is authority for the creation of the national industrial reserve out of World War II excess industrial property and provided for sale of this property, subject to a national security, or recapture, clause in the event of a national emergency, a complaint alleging damages for the sale by an owner thereof of personal property, alleged to be held by the owner under a national security clause, "without the written consent of the Secretary of the Navy", which complaint seeks an injunction to prevent alleged future sales, "without the written consent of the Secretary of the Navy", who is without authority under the Act, fails to state a cause of action, and a temporary injunction granted preventing all sales *pendent lite* "without the written consent of the Secretary of the Navy" is void on the face of the record.

POINT II, INFRA

When real and personal property is sold to a purchaser subject to a national security clause formulated by the Secretary of Defense pursuant to the terms of the Act, subsequent modification of that security clause, so as to remove the personal property from its restrictions, is binding upon the United States and no suit may be maintained by the Government on the original security clause; and it was error for the lower court to grant a temporary injunction in the action restraining the owner *pendent lite* from making other sales of his chattels from which the national security clause had been removed.

POINT III, INFRA

When a chattel mortgage is given to the Government as security for the payment of the balance of the purchase price of property purchased from the Government under the Act, partial releases of the chattels from the lien of the mortgage made by the Government, upon the payment to it

by the owner of the release prices fixed in the chattel mortgage, and when such releases are made pursuant to a covenant in the contracts between the Government and the owner, that the releases will be given only in the event that the provisions of the national security clause have been removed from the chattels, such partial releases terminated all interest of the Government in the chattels sold and the Government has no right to maintain a suit for damages or an injunction for the property so sold or threatened to be sold.

POINT IV, INFRA

Where a modified national security clause affecting property sold pursuant to the National Industrial Reserve Act of 1948 makes it incumbent upon the Secretary of Defense to exhaust his administrative remedies reserved to him in the contract and made pursuant to the authority vested in him by the Act, no suit alleging damages for a breach of such security clause or for an injunction therein can be maintained by the Government until it has first alleged and proved that these mandatory administrative remedies have been exhausted by the Secretary of Defense.

POINT I

The Temporary Injunction Is Void On the Face of the Record

The complaint alleged (R. 2-7) and the lower court found and concluded (R. 83-85 and 91-98) that the national security clause formulated by the Secretary of Defense under the National Industrial Reserve Act of 1948 had been imposed upon the personal property purchased by appellant from the Government solely by the bill of sale, dated June 1, 1949; that the Navy Department was the department of the Government which had jurisdiction over the machinery, machine tools and equipment sold and delivered to appel-

lant; that certain of appellant's machinery, machine tools and equipment had been sold to third persons "without the written consent of the Secretary of the Navy"; that, unless restrained by order of the court, appellant would sell more of its machinery, machine tools and equipment "without the written consent of the Secretary of the Navy" to the irreparable damage of the Government.

The temporary injunction (R.97) *restrains appellant during the pendency of the action from selling or otherwise disposing of its machinery, machine tools and equipment, acquired by appellant from the Government under the bill of sale, "without the written consent of the Secretary of the Navy"*. There is nothing in the National Industrial Reserve Act of 1948 (50 USCA, Sections 451-462), or in the National Security Act of 1947 as amended in 1949 (5 USCA, Sections 171 and 171a-171h) which gives the Department of the Navy, or its Secretary, any authority or power over the national industrial reserve, or over the contracts made by the Government with appellant, or over any other contract made pursuant to the National Industrial Reserve Act of 1948. Appellant quotes below so much of the National Industrial Reserve Act of 1948 (50 USCA, Secs. 452(a) and (c), 453(1), (2), and (3)) as it deems necessary to a decision herein.

Sec. 452. *Definitions*

"(a) The term '*national industrial reserve*', as used in this chapter, means that *excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a national security clause* * * *"

"(c) The term '*national security clause*', as used herein, means those terms, conditions, restrictions, and reservations, heretofore formulated or as may be formulated under section 453(2) of this title for insertion in instruments of sale or lease of property, determined in accordance with section 453(1) of this title to be a part of the national industrial reserve, which will guar-

antee the availability of such property for the purposes of national defense at any time when availability thereof for such purposes is deemed necessary by the Secretary of Defense.”

Sec. 453. *Powers and duties of Secretary of Defense*

“To effectuate the policy set forth in section 451 of this title *the Secretary of Defense is authorized and directed to—*

(1) determine which excess industrial properties should become a part of the national industrial reserve under the provisions of this chapter;

(2) formulate a national security clause, as defined in section 452(c) of this title *and vary or modify the same from time to time in such manner as best to attain the objectives of this chapter*, having due regard to securing advantageous terms to the Government in the disposal of excess industrial property;

(3) *consent to the relinquishment or waiver of all or any part of any national security clause in specific cases when necessary to permit the disposition of particular excess industrial property when it is determined that the retention of the productive capacity of any such excess industrial property is no longer essential to the national security or that the retention of a lesser interest than that originally required will adequately fulfill the purposes of this chapter * * **”

Before it was sold to appellant, subject to a national security clause, the real and personal property which appellant purchased from the Government was World War II excess industrial property. The national security clause originally imposed upon appellant's property (Sec. 452(c), *supra*) is found in paragraphs 1 to 15 of the quitclaim deed, dated June 1, 1949 (R. 59-64). Section 453, *supra*, *authorized and directed the Secretary of Defense to determine* (Sec. 453(1), *supra*) whether or not this property should be selected from excess industrial property for the national industrial reserve of which it became a part when it was sold (Sec. 452(a) *supra*) to appellant, subject to a national

security clause (Sec. 452(c), *supra*), formulated by the Secretary of Defense (Sec. 453(2), *supra*).

Section 453(3), *supra*, authorizes the Secretary of Defense to remove the security clause in whole or in part from any specific piece of property in the national industrial reserve. It was under this power to change the clause, which power is also reserved in appellant's old security clause (Par. 3, Original Quitclaim Deed, R. 59), that the Munitions Board consented to the modification of the original clause (R. 73-80) so as to remove it from appellant's machinery, machine tools and equipment.

Appellant quotes below so much of the National Security Act Amendments of 1949 (5 USCA, Secs. 171, 171a, 171a, 171h) as it deems necessary to a decision herein:

Sec. 171. *Establishment and composition*

“(a) There is established, as an Executive *Department of the Government, the Department of Defense, and the Secretary of Defense shall be the head thereof;*

“(b) There shall be within the Department of Defense (1) the Department of the Army, the Department of the Navy, and the Department of the Air Force, and each such department shall on and after August 10, 1949, be military departments in lieu of their prior status as Executive Departments. * * *”

Sec. 171a. *Secretary of Defense—(a) Appointment*

“(a) There shall be a Secretary of Defense, who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate:
* * *”

“(c)(4) The *Departments of the Army, Navy, and Air Force* shall be separately administered by their respective Secretaries *under the direction, authority, and control of the Secretary of Defense.*”

Sec. 171h. *Munitions Board—Establishment*

“(a) There is established in the Department of Defense a Munitions Board (hereinafter in this section referred to as the “Board”).”

Composition; appointment, compensation, and powers of Chairman

“(b) The Board shall be composed of a *Chairman*, who shall be the head thereof and *who shall, subject to the authority of the Secretary of Defense and in respect to such matters authorized by him, have the power of decision upon matters falling within the jurisdiction of the Board*, and an Under Secretary or Assistant Secretary from each of the three military departments, to be designated in each case by the Secretaries of their respective departments. *The Chairman shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and shall receive basic compensation at the rate of \$16,000 per annum.*”

The parts of the National Security Act Amendments of 1949, quoted above, establish a new Executive Department of the Government and name it the Department of Defense of which the Secretary of Defense is made the head. The status of Army, Navy, and Air is changed from Executive Departments, the positions they enjoyed under the so-called Unification Act of 1947, to military departments, subordinate to the Department of Defense and subject to the authority, control, and direction of the Secretary of Defense. The powers of the Munitions Board, a body “*established in the Department of Defense*,” are expanded so as to give the Chairman, who must be a civilian, “*the power of decision*”, subject to the authority and control of the Secretary of Defense, on all matters falling within the jurisdiction of the Board.

These great powers vested by The Congress in the Secretary of Defense cannot be treated lightly by the Navy Department and its Secretary. To hold, as the Government persuaded the lower court to do, that the Navy Department and its Secretary, who are subordinate to the Secretary of Defense, can, without any direction or authority from him, control and dispose of all former naval property now in

the national industrial reserve, amounts to the granting of a license to any one of the sixty-eight thousand naval officers to administer such property, sole authority over which has been conferred by The Congress on the Secretary of Defense. Especially is this true in the light of the proof by the Government (R. 161-162, 13 *Federal Register* 4576), that the Secretary of Defense had delegated his authority, powers and duties under the National Reserve Act of 1948 to the Munitions Board, a body wholly independent of the Navy Department and its Secretary; a board established by The Congress to prevent just what has happened here; and a board which has been given by the Secretary of Defense, subject to his authority and control, full power over the national industrial reserve. The Navy Department and its Secretary appear here to be mere usurpers.

The National Industrial Reserve Act of 1948 was approved July 2, 1948. The next day, July 3, the Secretary of Defense made the following delegation to the Munitions Board:

“NATIONAL MILITARY ESTABLISHMENT
Secretary of Defense
NATIONAL INDUSTRIAL RESERVE OF
GOVERNMENT-OWNED PROPERTY
DELEGATION OF AUTHORITY

Pursuant to the authority vested in the Secretary of Defense by the National Security Act of 1947 (61 Stat. 495), there are hereby delegated to the Munitions Board the functions, powers, duties and responsibilities of the Secretary of Defense under Public Law 883, 80th Congress (50 USCA, Sections 451-462), approved July 2, 1948.

JAMES FORRESTAL,
Secretary of Defense.

July 3, 1948”

13 *Federal Register* 4576

No other delegation by the Secretary of Defense, of his authority, power or duties under the National Industrial

Reserve Act, has been made and this delegation was made more than a year before the National Security Act Amendments of 1949 were adopted by The Congress. There is no allegation in the complaint, nor was there any attempt on the part of the Government to show that the Secretary of Defense, or the Munitions Board, authorized the bringing of the action, or even knew of it. The Navy Department and its Secretary are wholly without authority over appellant's property, or any part of the national industrial reserve, and the temporary injunction attempting to confer such authority on the Secretary of the Navy makes the injunction void on the face of the record.

The statutes themselves settle the contentions of appellant in its favor. However, appellant presents the case of *Cudahy Packing Company of Louisiana v. Holland*, 315 U. S. 357, 62 Sup. Ct. 651, which is directly in point. The question involved in the Cudahy case was whether the Administrator of the Wage and Hour Division of the Department of Labor had the authority to delegate his statutory power, given him by the Fair Labor Standards Act, to sign and issue a *subpoenas duces tecum*. The Administrator contended that the act gave him authority to delegate this power to his Regional Directors. The Supreme Court held that no such delegation could be made:

“If, as the Administrator contends, the section is to be read as authorizing delegation of the subpoena power, that authority is without limitation. *He may confer the power on any employee appointed under Sec. 4(b), whom ‘he deems necessary to carry out his functions and duties’, or even on those who render the voluntary and uncompensated service which he may accept under that section. Moreover, if so read, Sec. 4(c) likewise gives the Administrator unrestricted authority to delegate every other power which he possesses, and would render meaningless and unnecessary the provisions of Sec. 11 authorizing the Administrator to delegate his power of investigation to designated representatives.*

“If such is the meaning of the Act he could delegate at will his duty to report periodically to Congress, Sec. 4(d), to appoint industry committees and their chairmen, to fix their compensation and prescribe their procedure, Sec. 5, to approve or disapprove their reports by orders whose findings of fact, if supported by substantial evidence, are conclusive, Sec. 10, to define certain terms used in the Act, Sec. 13, to provide by regulations or orders for the employment of learners and handicapped workers, Sec. 14, as well as other duties. *A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.*

In the light of the facts and the law the motion of appellant to dismiss the complaint should have been granted and the temporary injunction denied; and the lower court erred in not so doing.

POINT II

The Modified Security Clause, Dated February 28, 1950, Terminated the Conditions and Restrictions of the National Security Clause Contained in the Bill of Sale of June 1, 1949.

The lower court found, in Finding III (R. 92-93) as follows:

By bill of sale dated June 1, 1949, plaintiff, acting through the War Assets Administration, an agency of the United States, sold, transferred, assigned, and delivered to the defendant certain industrial equipment, machine tools, and tools, more particularly described in said bill of sale as—(description omitted) upon the covenants, restrictions, conditions, and reservations set forth in said bill of sale, including, among others, the following:

“1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the ‘plant’, in which the

above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

"2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each.

"3. The Vendee for a period of ten (10) years from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of those machine tools or other severable production equipment as listed in Exhibit 'G' of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule 'A' and made a part hereof."

Said covenants, restrictions, conditions, and reservations comprise the "National Security Clause," as that term is defined in Section 452(c), U.S.C.A. Title 50.

It was error for the lower court to omit from its finding of fact and conclusion of law all reference to the modified security clause of February 28, 1950 (R. 74-81). Paragraphs 1 and 2 of the bill of sale, quoted above in Finding III, by reference put the machinery, machine tools and equipment under the security clause contained in the original quitclaim deed of June 1, 1949. This security clause gives the

Government an option to lease the plant at any time within 20 years from its date (R. 59) "for one or more periods not exceeding 5 years' duration each". Paragraph 10 of the quitclaim deed (R. 62) reserves to the Government this option to lease the land and permanent structures and appurtenances for 20 years; the timber structures and their appurtenances for 15 years; and the machinery, machine tools and equipment for 10 years. *The modified security clause of February 28, 1950 (R. 74-81) removes the reservations, conditions and restrictions from the timber structures and appurtenances and from the machinery, machine tools and equipment.*

The Government prepared both the original and modified security clauses. Like numbered paragraphs in each clause treat similar subjects. *The modified security clause was approved by the Munitions Board; and at the direction of the Board, General Services Administration executed it; appellant also executed it.* The removal of the restrictions on the machinery, machine tools and equipment are shown by a comparison of Paragraph 10 of the old clause with Paragraph 10 of the new clause, which for the convenience of the court are set out below:

Old Clause

(R. 62)

(June 1, 1949)

10. The Grantee will maintain all lands, structures and appurtenances now in or appurtenant to the plant and belonging to the United States of America at the time of sale through the period specified below in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time, but in no case in excess of 120 days; *provided, however, that Grantee shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified; and provided further that nothing contained in*

this agreement shall be construed to prevent the Grantee, for improving operating efficiency or increasing productive capacity, from moving any of the machine tools or readily severable facilities conveyed hereunder from place to place within the plant.

| <i>Facility</i> | <i>Period Maintenance</i> |
|--------------------------------------------------------------------------------------------------------------|-------------------------------|
| (a) Lands, permanent structures and appurtenances (main structural frame of metal, concrete or masonry)----- | 20 years |
| (b) Timber structures and their appurtenances ----- | 15 years |
| (c) <i>Machinery, machine tools and equipment</i> | 10 years |

New Clause

(R. 78)

(February 28, 1950)

10. The Grantee will maintain all lands, structures and appurtenances now on the plant and all buildings and structures placed thereon by Grantee, reasonable wear and tear and aging excepted, through the twenty-year period in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time but in no event, in excess of 120 days.

The italicized lines of Par. 10 of the old clause show that appellant was *obligated to retain, replace and maintain* the machinery, machine tools and equipment for ten years from June 1, 1949. Par. 10 of the new clause terminated this obligation of appellant. The modified security clause executed by General Services Administration, with prior approval of the Munitions Board, is binding upon the Government and is by Act of Congress made conclusive evidence of its regularity and effectiveness.

Sec. 233 (d), 41 USCA "A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter

shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.”

The lower court erred in failing to find that the modified quit claim deed removed the security clause from the machinery, machine tools and equipment.

The bill of sale cannot stand alone because the condition of paragraph 3, Finding III, (R. 92) is a mere covenant against resale void under all of the authorities. The rule is statutory in California where this property is located.

“Conditions restraining alienation, when repugnant to the interest created are void.”

California Civil Code, Section 711

There is no reverter in the bill of sale, or in the security clause in the quit claim deed to which it refers. The condition against resale is void as an unlawful restraint on alienation. The property is in California and is controlled by the law of that State.

“A rich oil field was discovered in Illinois in 1938. Thereupon this dispute arose between a trustee of a railroad in reorganization under Sec. 77 of the Bankruptcy Act, 11 U.S.C. Sec. 205, 11 U.S.C.A. Sec. 205, and other claimants as to the legal right to drill for and capture fugitive oil under the railroad’s right-of-way traversing the newly discovered field. The trustee asserts fee simple ownership of the right of way lands with consequent right to reduce the underlying oil by possession. Respondents deny the trustee’s alleged title or that he has any interest in the land beyond a mere easement—a limited right to use the surface for railroad purposes only. They allege that ownership of the fee is in others, from whom they have obtained oil leases. *This determinative question of fee simple own-*

ership can be decided only by interpretation, under Illinois law, of instruments granting the railroad its right of way." (Italic ours.)

Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 60 Sup. Ct. Rep. 628.

Conditions restraining alienation are void in California under the common law, as well as by statute.

"In this State it has been declared that when the granting clause in a deed purports to convey title in fee simple and is followed by a clause prohibiting the grantee from conveying without the consent of the grantor, the latter clause is repugnant to the interest created by the former, and being in restraint of alienation is void. (Civil Code Section 711.)

"* * * the rule that conditions in restraint of alienation when repugnant to an interest created are void (Civil Code, Section 711), 'does not depend upon the mere form in which the restraint is imposed.' It avoids as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; such covenants, if not within the letter of Section 711 of the Civil Code, are yet obnoxious to the policy of which that Section is a partial expression."

Bonnell v. McLaughlin, 173 Cal. 213, 159 Pac. 590.

The Supreme Court is in accord with California rule.

"Thus, general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void.' 'If a man,' says Lord Coke in 2 Coke on Littleton, Section 360, 'be possessed of a horse or of any other chattel, real or personal, and give or sell his whole interest

or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest or property is out of him, so as he has no possibility of a reverter; and it is against trade and traffic and bargaining and contracting between man and man.' "

Dr. Miles Medical Co. v. John D. Parks and Sons Co.,
220 U. S. 373, 31 Sup. Ct. 376.

The error in granting the temporary injunction preventing further sales of appellant's machinery, machine tools and equipment "without the written consent of the Secretary of the Navy" probably arose because of a recital in Par. 3 of the bill of sale set out in Finding III (R. 93),—That none of the machine tools or other severable production equipment in the plant would be sold without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction. The recital is meaningless. Neither of the three Secretaries, Army, Navy or Air are given any power or duties by the National Industrial Reserve Act of 1948. Besides, Par. 14 of the modified security clause (R. 80) provides: "As used in this agreement the term 'Secretary' shall be deemed to refer to the Secretary of Defense, as used in Public Law 883, 80th Congress and to his duly appointed representatives". Neither the Department of the Army, the Department of the Navy, nor the Department of Air, nor any one of their respective secretaries, has been appointed the representative of the Secretary of Defense, in this transaction, or in any other involving the National Industrial Reserve. The Munitions Board is the only duly appointed representative of the Secretary of Defense. It is an entirely separate body from Army, Navy and Air. The Munitions Board approved the modified security clause releasing the machinery, machine tools and equipment from it. In these circumstances it is difficult to understand why the Govern-

ment brought the action, or why the lower court entertained it and granted the injunction therein. In modifying the security clause, the Munitions Board was exercising the discretionary powers of the Secretary of Defense delegated to the Board by him. The lower court was without power to grant the temporary injunction defeating the exercise of this discretion.

POINT III

Before the Government Could Maintain the Action or Apply For An Injunction Therein, It Had To Show That It Had Complied with the Contractual and Administrative Remedies Set Out in Paragraphs 11 and 12 of the Modified Security Clause Which It Made No Attempt To Do

Pars. 5 and 6 of the bill of sale (R. 11) and Pars. 11 and 12 of the original security clause (R. 63) are almost identical. The new security clause of February 28, 1950 (R. 78) changed these paragraphs. Quoted below are pars. 11 and 12 of the original and modified security clause.

Original, dated June 1, 1949

(R. 63)

“11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

“12. When, in the opinion of the Secretary, the Grantee fails to comply with the obligations imposed upon it hereunder, the United States of America shall have the right to take full possession of the plant and to take such action as may be necessary to remedy the Grantee's default. All costs incidental to taking possession of the plant under these circumstances and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee. Upon completion of such work, possession of the

plant will be returned to the Grantee unless the dormant estate is activated in the interim."

Modified, dated February 28, 1950

(R. 78-79)

"11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

"12. If, as a result of inspection of the plant, the Government *adjudges the Grantee in default*, it shall *furnish to the latter a written statement setting forth in detail the grounds on which the allegations are based*, following which *the Grantee shall have thirty days to submit evidence to the contrary*. If, in the light of the evidence so presented, *the Government still holds that the Grantee is in default*, it shall then advise the latter of the specific defaults to be corrected and the periods of time in which each correction must be completed, such periods to be as reasonable as possible. If the Grantee fails to correct its defaults in the time stated, *the Government shall then have the right to take possession only of that part of the premises on which the breach has occurred and to remedy the Grantee's default*. The Government, or any contractor employed by the Government for the purpose, shall have such right of access over Grantee's premises to that part thereof as may be necessary to permit repairs and replacements to be made to correct the default of Grantee. *All costs incidental to taking possession of such part of the plant as may be necessary under these circumstances, and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee*. Upon completion of such work, possession of the part, or parts, of the plant taken over by the Government will be returned to the Grantee unless the dormant estate is activated in the interim."

Pars. 11 and 12 of the original security clause gave the Government an option to enforce the remedies provided in them. Not so with the new security clause which requires

the Government to give appellant a written statement setting forth the details of an alleged default. Appellant is then given thirty days to present evidence in opposition to the Government's claim of a default. If, on the evidence so presented, the Government holds that appellant is still in default, the Government must inform appellant of the specific default which it requires appellant to correct and set the time in which the correction must be made. If appellant should fail to correct the default within the time specified, the Government has the right to take possession of the part of the plant where the default has occurred and to correct it, charging the cost of the correction to appellant, which cost the Government could add to the principal of the note secured by the deed of trust and chattel mortgage (Par. 4; R. 69). The Government cannot make out a cause of action for damages or injunction until it has complied strictly with these provisions of the contract. The Government has made no attempt to do so.

Pars. 11 and 12 of the modified security clause provide administrative remedies authorized by the National Industrial Reserve Act of 1948 (Section 456(1), (4), 50 USCA) and amount to regulations made by the Secretary of Defense for the administration of appellant's property under the terms of the modified security clause. The Navy Department and its Secretary by attempting to usurp the control and administration of this former naval property through this suit are attempting to frustrate and subvert the military policy of the nation established by the Congress in the National Security Act of 1947 as amended, popularly known as the "Unification Act," and in the National Industrial Reserve Act of 1948. This is a most unpropitious time for a subordinate military unit to assert its independence of directives made by its chief.

The only method provided in the National Industrial Reserve Act of 1948 for the administration of the National In-

dustrial Reserve is by contracts made by the Government with its citizens at the direction of the Secretary of Defense, the terms and conditions of which contracts he is directed by the Congress to formulate (Sec. 453(2), 50 USCA). The property now owned by appellant passed into the National Industrial Reserve by means of a sale and conveyance of it by the Government to appellant, subject to a national security clause (Sec. 452(a), 50 USCA), formulated by the Secretary of Defense. These directives are contained in the contracts so made by the Government with appellant; they were authorized by the Secretary of Defense under the direction of the Congress; and they require the Secretary of Defense, or his designated representative, the Munitions Board, to afford the appellant the opportunity to be heard before this action could be maintained.

Administrative Procedure Act, 5 USCA, Secs. 1002, 1006;
Monolith Portland Midwest Company v. Reconstruction Finance Corporation (Court of Appeals, 9th Circuit), 178 Fed. 2d 854;

Morgan v. United States, 298 U. S. 468, 56 Sup. Ct. 906;
Morgan v. United States, 304 U. S. 1, 58 Sup. Ct. 773.

POINT IV

The Releases From the Chattel Mortgage Relinquished All Interest the Government Had In the Chattels Sold; and the Payments to the Government of the Fair Value of the Chattels Sold Defeats Its Claim for Damages. The Government Has No Right To An Injunction Because the Remaining Chattels Cannot Be Sold Unless Released from the Chattel Mortgage

Par. 9 of the letter of intent (Government Exhibit No. 1) which is Appendix B of this brief, is the start of the written releases.

“9. In the event the *restrictions of the National Se-*

curity Clause are removed from the personal property to be transferred, the Government will release the personal property from the lien of the chattel mortgage upon payment by purchaser of a total amount not to exceed \$366,660.00 to be applied against the unpaid balance of the total indebtedness in inverse order of maturity."

This provision of the letter of intent was carried forward into Paragraphs 2 and 3 of the chattel mortgage (R. 68). Paragraphs 2 and 3 of the chattel mortgage are as follows:

"2. Mortgagor shall not have the right, power or authority to, and will not, *without the written consent of Mortgagee, remove from its present location as herein above set forth, or sell or encumber any of the mortgaged chattels, or substitute or replace any of the mortgaged chattels.*"

"3. The Mortgagee *agrees to release all the chattels from the lien of this chattel mortgage* upon the payment by Mortgagor to Mortgagee the sum of Three Hundred Sixty-six Thousand Six Hundred Sixty Dollars (\$366,660), *which sum has been established as the fair value of said chattels. The Mortgagee will also release a part or any portion of said chattels upon the payment by the Mortgagor to Mortgagee of the fair value (fair value to be established by Mortgagee) of the property to be released.* All payments so made shall be applied against the unpaid balance of the total indebtedness of Nine Hundred Sixty-one Thousand Two Hundred Dollars (\$961,200) in the inverse order of maturity, as specified in the terms of the promissory note of even date."

Upon the release of the security clause from the chattels, appellant sold some of the machinery, machine tools and equipment and paid the Government their *fair value fixed by the Government* as provided for in Paragraph 3 of the chattel mortgage. The Government, acting through General Services Administration, after notice that the prop-

erty had been sold, gave written releases to appellant in accord with Paragraph 2 of the chattel mortgage for the property so sold (R. 40-52).

Paragraph 2 of the letter of intent required compliance with *War Assets Administration Regulation* No. 5, Paragraph 6 of which regulation defines "fair value". It reads as follows:

"(6) '*Fair value*' means the maximum price which a well-informed buyer, acting voluntarily and intelligently, would be warranted in paying if he were acquiring the property for investment or for use with the intention of devoting such property to the best or most productive type of use for which the property is suitable or capable of being adapted.'" (Italic in the original.)

The releases so made are conclusive evidence of their regularity and of the title and interest conveyed by the Government (41 USCA, Section 233(d) (Appendix C hereto). This leads us to inquire on what theory the Government seeks damages or an injunction. The security clause has been released on the chattels by the modified quitclaim deed; the Government has accepted the fair value fixed by it for the chattels sold and has released them from the lien of the chattel mortgage in accord with provisions of Paragraphs 2 and 3, *supra*, of the chattel mortgage and Paragraph 9 of the letter of intent. The releases were made by a responsible agency of the Government authorized by Congress to make them and they were given in strict accord with the contracts made pursuant to Congressional direction. The Government is bound by its contracts with appellant the same as an individual would be.

Los Angeles and Salt Lake Ry. v. U. S. (Ct. of App. 9th Cir.), 140 Fed. 2d 436;

Standard Oil Co. of New Jersey v. U. S., 267 U. S. 76, 45 Sup. Ct. 211.

The order granting the temporary injunction is erroneous and should be reversed.

Respectfully submitted,

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Oakland, Cal.,
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APPENDIX

APPENDIX A

PUBLIC LAW 883—80TH CONGRESS

CHAPTER 811—2D SESSION

S. 2554

50 USCA, SECTIONS 451-462

**CHAPTER 16—NATIONAL INDUSTRIAL RESERVES
(NEW)****Sec. 451. Congressional declaration of purpose and policy**

In enacting this chapter, it is the intent of Congress to provide a comprehensive and continuous program for the future safety and for the defense of the United States by providing adequate measures whereby an essential nucleus of Government-owned industrial plants and a national reserve of machine tools and industrial manufacturing equipment may be assured for immediate use to supply the needs of the armed forces in time of national emergency or in anticipation thereof; it is further the intent of the Congress that such Government-owned plants and such reserve shall not exceed in number or kind the minimum requirements for immediate use in time of national emergency, and that any such items which shall become surplus to such requirements shall be disposed of as expeditiously as possible.

Sec. 452. Definitions

(a) The term “national industrial reserve”, as used in this chapter, means that excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a national security clause, and that excess industrial property of the United States which not having been sold, leased, or otherwise disposed of, subject to a national security clause, shall be transferred to the Administrator of General Services under section 454 of this title.

(b) The term "excess industrial property," as used herein, means any machine tool, any industrial manufacturing equipment and any industrial plant (including structures on land owned by or leased to the United States, substantially equipped with machinery, tools and equipment) which is capable of economic operation as a separate and independent industrial unit and which is not an integral part of an installation of a private contractor, which machine tools, industrial manufacturing equipment, and industrial plants are under the control of any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation and which are not required for its immediate needs and responsibilities as determined by the head thereof.

(c) The term "national security clause", as used herein, means those terms, conditions, restrictions, and reservations, heretofore formulated or as may be formulated under section 453 (2) of this title for insertion in instruments of sale or lease of property, determined in accordance with section 453 (1) of this title to be a part of the national industrial reserve, which will guarantee the availability of such property for the purposes of national defense at any time when availability thereof for such purposes is deemed necessary by the Secretary of Defense.

Sec. 453. Powers and duties of Secretary of Defense

To effectuate the policy set forth in section 451 of this title the Secretary of Defense is authorized and directed to—

- (1) determine which excess industrial properties should become a part of the national industrial reserve under the provisions of this chapter;

- (2) formulate a national security clause, as defined in section 452(c) of this title and vary or modify the same from time to time in such manner as best to attain the objectives of this chapter, having due regard to se-

curing advantageous terms to the Government in the disposal of excess industrial property;

(3) consent to the relinquishment or waiver of all or any part of any national security clause in specific cases when necessary to permit the disposition of particular excess industrial property when it is determined that the retention of the productive capacity of any such excess industrial property is no longer essential to the national security or that the retention of a lesser interest than that originally required will adequately fulfill the purposes of this chapter: *Provided*, That nothing in this subsection shall require the modification or waiver of any part of any such national security clause when such clause is deemed necessary by the Secretary of Defense to effectuate the purposes of this chapter; and

(4) designate what excess industrial property shall be disposed of subject to the provisions of the national security clause.

Sec. 454. Plant disposal; modification of national security clause; transfer to Administrator of General Services; machine tools

(a) In the event that any agency charged with the disposal of excess industrial property, after making every practicable effort so to do, is unable to dispose of any excess industrial plant because of the national security clause it shall notify the Secretary of Defense, indicating such modifications in the national security clause, if any, which in its judgment would make possible disposal of the plant. The Secretary of Defense shall consider and agree to any and all such proposed modifications as in his judgment would be consistent with the purposes of this chapter. If, however, such clause is not modified or the requirements thereof waived pursuant to section 453(c) of this title, or if modified, such plant cannot then be disposed of under such modified clause, the Secretary of Defense shall direct that such plant be transferred to the Administrator of Gen-

seral Services, and such transfer shall be without reimbursement or transfer of funds.

(b) Notwithstanding any other provisions of law, any agency charged with the disposal of excess machine tools and industrial manufacturing equipment shall transfer custody of such machine tools and equipment as may be designated by the Secretary of Defense pursuant to section 453 of this title to the Administrator of General Services, without reimbursement, for storage and maintenance.

Sec. 455. Acceptance of plants by Administrator of General Services; disposition; conditions of lease

Subject to provisions of section 456 of this title, the Administrator of General Services is authorized and directed to accept the transfer to it of such excess industrial property as is directed to be transferred to it under section 453 of this title and, as and when directed or authorized by the Secretary of Defense pursuant to section 456 of this title, to utilize, maintain, protect, repair, restore, renovate, lease, or dispose of such property. Notwithstanding section 303(b) of Title 40, any lease may provide for the renovation, maintenance, protection, repair, and restoration by the lessee of the property leased, or of the entire unit or installation when a substantial part thereof is leased, as part or all of the consideration for the lease of such property.

Sec. 456. Powers of Secretary of Defense respecting property in national industrial reserve

The Secretary of Defense, with respect to property in the national industrial reserve, is authorized when he deems such action to be in the interest of national security—

- (1) to establish general policies for the care, maintenance, utilization, recording, and security of such property transferred to the Administrator of General Services pursuant to section 454 of this title; and

(2) to direct the transfer without reimbursement by the Administrator of General Services of any of such property to other Government agencies with the consent of such agencies; and

(3) to direct the leasing by the Administrator of General Services of any of such property to designated lessees; and

(4) to authorize the disposition by the Administrator of General Services of any of such property by sale or otherwise when in the opinion of the Secretary of Defense such property may be disposed of subject to or free of the national security clause provided for in section 454 of this title; and

(5) to authorize and regulate the lending of any such property by the Administrator of General Services to any nonprofit educational institution or training school when (a) the Secretary shall determine that the program proposed by such institution or school for the use of such property will contribute materially to national defense, and (b) such institution or school shall by agreement make such provision as the Secretary shall deem satisfactory for the proper maintenance of such property and for its return to the Administrator of General Services without expense to the Government.

Sec. 457. Transportation, maintenance, disposition, etc., by Administrator of General Services of transferred property

As and when directed or authorized by the Secretary of Defense pursuant to the provisions of section 456 of this title, the Administrator of General Services shall after the date upon which transfer is directed pursuant to section 454 of this title provide for the transportation, handling, care, storage, protection, maintenance, utilization, repair, restoration, renovation, leasing, and disposition of excess industrial property.

Sec. 458. Limitation on acquisition of property

Nothing contained in this chapter shall be construed as authorizing the acquisition of any property for the national industrial reserve except from excess or surplus Government-owned property.

Sec. 459. Industrial Reserve Review Committee; composition, appointment, tenure, and compensation; law inapplicable

The Secretary of Defense shall appoint a National Industrial Reserve Review Committee, which shall consist of not exceeding fifteen persons to be appointed from civilian life who are by training and experience familiar with various fields of American industry, including shipbuilding, aircraft manufacture, machine tools, and arms and armament production. The members of such Committee shall serve for such term or terms as the Secretary of Defense may specify and shall meet at such times as may be specified by the Secretary of Defense to consult with and advise the Department of Defense. Each member of such Committee shall be entitled to compensation in the amount of \$50 for each day, or part of day, he shall be in attendance at any regular called meeting of the Committee, together with reimbursement for all travel expenses incident to such attendance: *Provided*, That nothing contained in sections 281, 283, and 434 of Title 18, section 99 of Title 5; in last paragraph of section 119 of Title 41; or in any other provision of Federal law imposing restrictions, requirements, or penalties in relation to the employment of persons, the performance of services, or the payment or receipt of compensation in connection with any claim proceeding, or matter involving the United States, shall apply to such persons solely by reason of their appointment to and membership on such Committee.

Sec. 460. Duties of Committee; recommendations

It shall be the duty of the Committee appointed under section 459 of this title to review not less often than once each year the justification for the retention of property in the national industrial reserve established hereunder and (i) to recommend to the Secretary of Defense the disposition of any such property which in the opinion of the Committee would no longer be of sufficient strategic value to warrant its further retention for the production of war material in the event of a national emergency; (ii) to recommend to the Secretary of Defense standards of maintenance for the property held in the national industrial reserve; (iii) to review and recommend to the Secretary of Defense the disposal of that property which in the opinion of the Committee could and should be devoted to commercial use in the civilian economy; and (iv) to advise the Secretary of Defense with respect to such activities under this chapter as he may request.

Sec. 461. Reports to Congress

The Secretary of Defense shall submit to the Congress on April 1 of each year a report detailing the action taken by it under this chapter and containing such other pertinent information on the status of the national industrial reserve as will enable the Congress to evaluate its administration and the need for amendments and related legislation.

Sec. 462. Appropriations

There are authorized to be appropriated to the office of the Secretary of Defense and to the Administrator of General Services out of any moneys in the Treasury not otherwise appropriated, such sums as the Congress may, from time to time, determine to be necessary to enable the Secretary of Defense and the Administrator of General Services to carry out their respective functions under this Chapter.

APPENDIX B

LETTER OF INTENT FROM REGIONAL OFFICE
WAR ASSETS ADMINISTRATION
1000 GEARY STREET
SAN FRANCISCO, CALIFORNIA

May 27, 1949

In reply refer to:

RSF-C-PD

Moore Dry Dock Co. (West Yard)

(Fee-Owned Portion Only)

M-Calif-174

Oakland Dock and Warehouse Company
c/o Breed, Robinson and Stewart
Financial Center Building
Oakland, California

Attention: Mr. R. W. Van Deusen

Gentlemen:

This letter acknowledges the receipt of the 20% down payment of \$240,300.00, as provided in our letter of award, April 11, 1949, to your corporation.

The 20% down payment having been made in accordance with the terms of the award, you are authorized to enter into and take possession of the premises, comprising the subject sale, upon your written acceptance and approval of the following terms and conditions:

1. The total purchase price is \$1,201,500.00, of which the 20% down payment of \$240,300.00 has heretofore been paid; the balance of \$961,200.00 to be evidenced by your promissory note payable in equal annual installments of \$48,060.00. The first annual payment shall be made on June 1, 1950, plus interest at the rate of 4% per annum on the unpaid balance, commencing June 1, 1949, also payable annually. Said promissory note to be secured by a purchase money deed of trust

and chattel mortgage covering the premises and personal property, subject of this sale.

2. Compliance with the requirements of WAA Regulation No. 5, including the amendments thereto.

3. It has been mutually agreed that you will take delivery of the premises and personal property subject to this sale effective 12:01 A.M., Pacific Standard Time, June 1, 1949, and you will accept accountability of the land, buildings, building installations and all personal property comprising this sale.

4. You will provide adequate insurance coverage in amounts and in companies to be approved by War Assets Administration Insurance Officer effective 12:01 A.M., June 1, 1949.

5. You will be responsible for and pay all taxes levied on the property, comprising subject sale, commencing June 1, 1949, and you will reimburse War Assets Administration on demand for any taxes paid by reason of said levy.

6. You will be responsible for and pay all public utilities pertaining to said premises commencing 12:01 A.M., Pacific Standard Time, June 1, 1949.

7. You will provide and be responsible for adequate guard service commencing 12:01 A.M., Pacific Standard Time, June 1, 1949, as may be required by our Property Management Division.

8. Title to be conveyed by quitclaim deed and bill of sale without warranty, express or implied, and you will execute a promissory note secured by a deed of trust and chattel mortgage.

(a) War Assets Administration does not furnish and will not pay for any policy of title insurance or any escrow fees or any portion thereof.

(b) You will pay for and attach to the deed any and all revenue stamps required by law.

(c) You will pay all recording fees involved in this transaction.

9. In the event the restrictions of the National Security Clause are removed from the personal property to be transferred, the Government will release the personal property from the lien of the chattel mortgage upon payment by purchaser of a total amount not to exceed \$366,660.00 to be applied against the unpaid balance of the total indebtedness in inverse order of maturity.

10. Any lease by you of the entire premises will be subject to prior written approval of War Assets Administration. All leases will be pledged to further secure said promissory note according to the terms of the deed of trust.

11. The award to you of the real and personal property comprising this sale is that which is described in the Invitation to Bid.

12. Clearance by the U. S. Department of Justice that the proposed disposal to your company is not in violation of the Anti-Trust Laws of the United States.

13. It is understood and agreed that in the event of failure to consummate the sale of these premises, you will vacate and surrender them to War Assets Administration in the same condition that they were accepted by you. In the event the sale is not consummated, the entire down payment of \$240,300.00 will be returned to you without interest, provided the failure to consummate was not due to any fault of your firm. The Government will not be responsible or accountable for any costs or reimbursement.

14. Any other legal requirements deemed necessary or essential by the Office of Regional Counsel, War Assets Administration, San Francisco, California.

You will indicate your approval and acceptance of the foregoing terms and conditions in the space provided below on three copies hereof and return said three copies to this office, together with three executed copies of the resolution

of your Board of Directors authorizing the acceptance of this Letter of Intent.

Very truly yours,

ROBERT B. BRADFORD

Regional Director

Approved and Accepted
this 31st day of May, 1949

OAKLAND DOCK AND WAREHOUSE COMPANY

By JULES J. AGOSTINI, JR.

President

A. HANFORD MORGAN

Secretary

APPENDIX CPUBLIC LAW 151—81ST CONGRESSCHAPTER 288-1ST SESSION

H. R. 4754

TITLE 41 USCA, SECTIONS 201-274

* * *

Sec. 233. Disposal of surplus property—Supervision and direction

(a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this chapter.

Care and Handling

(b) The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

Method of Disposition

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

Valadity of Deed, Bill of Sale, Lease, Etc.

(d) A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

Advertising as Prerequisite to Disposal

(e) Unless the Administrator shall determine that disposal by advertising will in a given case better protect the public interest, surplus property disposals may be made without regard to any provision of existing law for advertising until 12 o'clock noon, eastern standard time, December 31, 1950.

Contractor Inventories

(f) Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

* * *

No. 12,653

IN THE
United States Court of Appeals
For the Ninth Circuit

OAKLAND DOCK AND WAREHOUSE COM-
PANY (a corporation),

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FRANK J. HENNESSY,

United States Attorney,

ROBERT F. PECKHAM,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED
OCT 12 1936
WILLIAM R. DUFFY, CLERK

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No. 12,653

IN THE

**United States Court of Appeals
For the Ninth Circuit**

OAKLAND DOCK AND WAREHOUSE COM-
PANY (a corporation),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

PRELIMINARY STATEMENT.

Appellant has appealed from an interlocutory order of the United States District Court for the Northern District of California, Southern Division, granting a preliminary injunction restraining appellant from disposing of certain machinery in violation of restrictions contained in the bill of sale by which appellant acquired the property from appellee (R. 83, 97). The District Court also denied appellant's motion to dismiss the complaint. Appellant apparently appeals from that portion of the Court's order as well, although its notice of appeal does not so state.

JURISDICTION.

The jurisdiction of this Court to hear and decide this appeal is granted by 28 U.S.C. 1292(1).

STATEMENT OF THE CASE.

The facts and issues of the case are clearly and succinctly stated in the District Court's Order (R. 83-85) and in its findings of fact, conclusions of law, and interlocutory decree of injunction (R. 90-98). In its brief, appellant has seen fit to expand on the facts thus found. Without conceding the truth of any other statements in appellant's statement of the case, appellee takes particular exception to the following statements, which are at variance with the facts as found by the Court and established by the evidence:

1. The statement that the national security clause appeared in the quitclaim deed only (App. Br., 4) is not correct. The national security clause is contained in the bill of sale by which appellant acquired from appellee the machinery involved in this action (R. 92-3).

2. The statements that the modification of February 28, 1950, of the quitclaim deed freed the machinery, machine tools, and equipment from the national security clause, and that the clause as modified remained on the land and its appurtenances only (App. Br., 5), are not correct, for the reason stated in paragraph 1 above.

QUESTION PRESENTED.

Whether a District Court has discretion to enjoin one who acquires property from the United States, upon terms and conditions contained in the bill of sale preserving such property for national defense uses, from disposing of such property in violation of such terms and conditions.

Appellant has confused this simple issue by listing seven "Questions Presented by This Appeal," all leading and argumentative in tone, and by specifying some twelve errors, most of which relate to wholly irrelevant matters.

SUMMARY OF ARGUMENT.**Point I.**

The District Court's findings of fact are presumptively correct, are supported by the record, and are not refuted by anything which appellant has advanced.

Point II.

The District Court's conclusions of law are in accord with the applicable statutes and have been correctly applied to the facts of the case.

Point III.

The remaining arguments advanced by the appellant are wholly without merit.

ARGUMENT.**POINT I.**

THE DISTRICT COURT'S FINDINGS OF FACT ARE PRESUMPTIVELY CORRECT, ARE SUPPORTED BY THE RECORD, AND ARE NOT REFUTED BY ANYTHING WHICH APPELLANT HAS ADVANCED.

It is elementary that the findings of the trial Court are presumptively correct and unless wholly unsupported by the record must be accepted on appeal. This principle applies as much to a temporary injunction granted after a preliminary hearing as it would to a final injunction granted after a full trial. *Gasaway v. Borderland Coal Company*, 278 F. 56 (C.C.A. 7, 1921).

The District Court made ten findings of fact. Findings I and II are formal and not disputed (R. 91).

The National Security Clause.

As part of finding III, the District Court found that the covenants, restrictions, conditions, and reservations set forth in the bill of sale comprised the "National Security Clause," as that term is defined in Section 3(c) of the National Industrial Reserve Act of 1948 (62 Stat. 1225, 50 U.S.C.A. 452c). (R. 93). Appellant does not dispute this, but alleges error in that the Court failed to make a finding as to the effect of the reference in paragraphs 1 and 2 of said clause to the National Security Clause which appeared in the original quitclaim deed, and in "finding by inference" that the subsequent modification of the clause in the deed had not removed the clause from the machinery, machine tools and equipment (App. Br., 8).

By finding IX the District Court found that the National Security Clause had *not* been removed from the machinery, machine tools and equipment (R. 95-96). Appellant disputes this, alleging that the February 28, 1950, modification of the deed did remove the clause from the machinery, machine tools and equipment (App. Br. 9).

To keep the discussion on this point clear, it is necessary to distinguish between the *evidence* which was before the District Court, and the self-serving and wholly erroneous statements of alleged fact and law which appellant's counsel made in his presentation before that Court. The *evidence* shows the following:

The Oakland property was conveyed to appellant by two separate instruments: a quitclaim deed covering the real estate (site and buildings), and a bill of sale covering the personal property (machinery, machine tools, and equipment) (R. 7-13, 52-73, 207). Each instrument contained a national security clause, though not in identical terms (R. 9-11; 59-64). The clause in the bill of sale covered specifically the machinery, machine tools and production equipment therein described, and (a) prohibited the vendee, for a period of ten years, from disposing of such tools and equipment without the written consent of the Secretary of the military department (Army, Navy, or Air Force), having jurisdiction, and (b) required the vendee to preserve, protect and maintain such machinery, tools and equipment for a period of 10 years. The clause also gave the cognizant Secretary a right of inspection, and gave the Government a right of entry to

cure default. The clause included a recital that the yard in which the property was located was considered a war reserve plant, and another recital referring to a quitclaim deed of even date in which the Government had reserved a "dormant estate" for a period of 20 years in said plant.

The quitclaim deed conveyed only the real estate and certain appurtenances, referred to as the "plant." The national security clause in the deed reserved a "dormant estate" in the *plant* for 20 years. This clause made certain incidental references to machinery, machine tools and equipment. The first of these required the grantee, in the event of activation of the dormant estate by the Government, to remove "improvements, fixtures, alterations, machinery and other equipment" in accordance with the directions and instructions of the Government (R. 60). The second provided that, if the dormant estate should be activated, the Government would, upon completion of its period of use, pay the grantee its reasonable costs of reinstalling its machinery, equipment, and improvements (R. 61). The third provided that the grantee (a) was not required to retain, replace or maintain the machinery, tools and equipment for more than ten years, and (b) was not precluded from moving them from place to place within the plant (R. 62). The clause also prevented the grantee, without the written consent of the Secretary, from moving or altering, under certain conditions, any non-severable building, "installation" or land improvements (R. 61).

On February 28, 1950, the quitclaim deed was modified and a new national security clause substituted (R. 73-80). The first two references to machinery and equipment were retained (R. 76, 77). The third was omitted (R. 78). The word "installation" was not used. On the other hand, the modified clause included a new reference to the personal property, not found in the original deed, namely, a specific provision that the Government would pay fair compensation to the grantee, during any period of activation, for the use of the premises and appurtenances, and the *machinery and equipment* taken over by the Government (R. 77).

The bill of sale itself has never been modified. Nowhere in the February 28, 1950, modification of the deed is there any statement or slightest indication of an intent to remove the restrictions of the National Security Clause from the personal property. Yet on this state of the record, appellant would have this Court believe that this was done and that the Court below erred in finding otherwise.

Finding no comfort in the record, appellant has resorted to all kinds of conjecture and argumentation, quoting out of context irrelevant statements in the Reports of the Munitions Board on the National Industrial Reserve, ascribing improper motives to the Navy Department, and dredging up similar irrelevancies, all in a desperate attempt to cover up the transparent weaknesses of its case.

There is no *evidence* in the record bearing on the intent of the parties in executing the February 28,

1950 modification. Appellant believes that the whole question of the modification of the deed is irrelevant, because the case turns on the provisions of the bill of sale. But if, at the trial on the permanent injunction, appellant succeeds in bringing up this point, the Government is prepared to show, by competent evidence, that the changes of which appellant makes so much, were in fact made upon the request of counsel for the appellant and solely upon his representation that he wished to avoid any duplication and overlapping between the two instruments, and desired to be put in a better position subsequently to request removal of the restrictions contained in the bill of sale without having to request a second modification of the deed. The Government can further prove that this was the *sole* ground for the change, and that this fact was brought home both to appellant's president and to its counsel. For appellant now to argue that these changes made under these circumstances, amounted to a surrender by the Government of its rights, approaches chicanery.

Appellant makes much of the fact that the National Security Clause in the bill of sale refers to the quitclaim deed. Its argument seems to be that the former incorporated the latter by reference, and that, when the latter was modified and the references to the personal property deleted, the clause of the bill of sale became nugatory. This argument will not stand analysis.

First of all, the references in the bill of sale are mere recitals. At the hearing, counsel for appellant

cavalierly dismissed the first recital, that the yard in which the chattels were located was a war reserve plant, as "not meaning anything," but pronounced the second recital, which referred to the quitclaim deed, as "important" (R. 331). Obviously, appellant cannot have it both ways.

Be that as it may, appellant apparently contends that the clause in the bill of sale fails because there is no option to lease, or reverter clause, applicable to the personalty, in the modified quitclaim deed (R. 331, App. Br. 23). Insofar as this contention is based on a legal argument, it will be discussed below. As a proposition of fact, it is irrelevant.

To begin with, the modified quitclaim deed reserved no more and no less than the original deed. Both reserved a dormant estate in the "plant," described as the realty and its appurtenances. The original deed made two incidental references to the personalty which were not carried over into the modified deed. One of these was a mere proviso that the grantee was not obligated to retain, replace or maintain the personalty for more than ten years. As such it merely removed any possible inconsistency between the deed and the bill of sale, which imposes an *affirmative* obligation to retain, replace, and maintain the personalty for ten years. The other permitted the grantee to move machinery around in the plant, hardly a significant provision.

On the other hand, the modified deed contains a specific reference to the personalty which is *not* found in the original deed, in that it provides, in paragraph

8, that in the event of activation of the dormant estate the Government will pay fair compensation for any *machinery and equipment* taken over by it. This is a far stronger indication than anything found in the original deed that the Government *has* reserved an option to lease the personalty. But appellant chooses to ignore this particular change.

If appellant is claiming that the clause in the bill of sale is nugatory because the Government has no legal right to recapture the personalty, that question is not before the Court. If the assumption is that a National Security Clause *must* reserve a right of recapture to be enforceable, this is simply not so. The statute defines the clause as those “terms, conditions, restrictions, and reservations, * * * as may be formulated under Section 4 (2) of this Act * * * which will guarantee the availability of such property for the purpose of national defense * * *” (50 U.S.C.A. 452(c)). Availability is guaranteed if the grantee is (i) required to maintain, and (ii) prevented from dissipating, the property. This is what the regulations of the munitions board required for a bill of sale (Pl. Ex. 3-A, p. 284), and it is exactly what the bill of sale provides. Recapture is not the only means of making the clause effective: the Government can negotiate a contract with the grantee, or it can lease the property from the grantee. Failing these, it can condemn the property. The important thing is that the property be kept available and intact as a productive unit.

Finally, appellant seems to claim that, whereas the modified quitclaim deed, which allegedly does not re-

serve a national security clause on the personalty, is valid, the original deed, which did make such a reservation, was void (R. 331). It is impossible to follow the tortuous reasoning which leads to this bizarre result. Suffice it to say that it is typical of appellant's "Heads I win, tails you lose" approach.

Designation of the Property.

By Finding IV, the Court below found that the personal property here involved is a part of the National Industrial Reserve (R. 93). At the hearing appellant tried to show that the designation of the Moore Drydock West Yard (now the Oakland property) as part of the reserve was somehow irregular, but he has not raised this point on appeal. The Court's finding is fully supported by the record.

Violation of Clause.

By Finding V, the Court below found that appellant had sold certain of the machine tools and equipment without the written consent of the Secretary of the Navy, in violation of the restrictions in the bill of sale. By Finding VI, the Court found that appellant would continue to make such sales, unless restrained by Court order, and that such further sales would materially reduce the capacity of the plant, would frustrate public policy as embodied in the National Industrial Reserve Act of 1948, and would cause irreparable damage to the United States (R. 94-95).

Appellant does not deny that it has made such sales, or that it would have continued to make them, absent

the Court's order. It claims error, however, in the Court's finding that the Navy Department has jurisdiction over the machinery, tools, and equipment, and in its finding that the sales and threatened sales "without the written consent of the Secretary of the Navy" are in violation of the law and appellant's contracts (App. Br. 8). It then makes the extraordinary contention that the temporary injunction is "void on the face of the record" because of the reference therein to the "written consent of the Secretary of the Navy" (App. Br. 12-19).

Appellant's argument on this point is most curious. It seems to be based on the view that only the Secretary of Defense has any legal authority over the National Industrial Reserve, that the only delegation from the Secretary of Defense in this area is to the munitions board, and that the Navy Department and its secretary are acting as "mere usurpers" (App. Br. 16-18).

At the outset, it should be understood why the Court below framed its findings and order as it did. The Court was merely following the language of the bill of sale, which of course is controlling. The latter bars the vendee, for a period of ten years, "without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which department has jurisdiction," from removing, selling or disposing of any of the machine tools or other serviceable production equipment in the plant, and so on (R. 9). By "jurisdiction" is here meant, not jurisdiction in the techni-

cal legal sense of the power of a Court to pronounce judgment in a given case, but rather administrative cognizance or, as it is commonly referred to in this connection, "sponsorship." The Court below properly found that of the three military departments, the Navy was the one which had "jurisdiction" within the meaning of the bill of sale. The munitions board has in fact, by memorandum dated 31 August 1949, a copy of which is annexed as Appendix I, designated the Navy as the department authorized to "administer" the national security clause on the Moore Drydock (now the Oakland) property. Even though this particular paper was not before the Court below on the preliminary hearing, there was ample evidence which warranted the Court's finding. The 1949 and 1950 Annual Reports of the munitions board to Congress on the National Industrial Reserve both list the Moore Drydock Company West Yard as under the sponsorship of the Navy (Pl's. Ex. 3-A, p. 102; Pl's. Ex. 3-B, p. 101). Various witnesses testified that any modifications of the national security clause on the property, and other matters pertaining thereto, were the concern of the Navy as well as the munitions board (R. 201, 228, 230, 232, 252, and *passim*). Finally, there is no serious contention by anyone that the Army or Air Force would have any interest in this property.

It is clear (i) that the Court was fully justified in finding that, of the three military departments, the Navy has "jurisdiction" over this property within the meaning of the bill of sale, and (ii) that in referring to the "written consent of the Secretary of

the Navy," the Court was faithfully following the language of the bill of sale.

Where did the language in the bill of sale come from? From no one other than the munitions board. Under Section 4(2) of the National Industrial Reserve Act of 1948, the Secretary of Defense is authorized to "formulate a national security clause, as defined in Section 3(c) hereof, and vary or modify the same from time to time in such manner as best to attain the objectives of this Act. * * *" (50 U.S.C.A. 453(2)). On 3 July 1948, one day after this Act was approved, the Secretary of Defense delegated to the munitions board his functions, powers, duties and responsibilities thereunder (13 F.R. 4576). Appellant does not question the validity of this delegation. It follows that the munitions board was authorized to formulate a national security clause and to vary or modify it from time to time.

The clauses formulated by the board for use at the time the original deed and bill of sale were given (1 June 1949) appear in 14 FR 1492 (1 April 1949), 32 CFR (1949 Supp.) Part 113, and are reprinted in the board's 1949 Report to Congress (Pl's Ex. 3-A) at pages 275-289. These clauses, as well as the clauses contained in the bill of sale and the original quitclaim deed (R. 9, 63), refer, in substantially similar terms, to the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, depending upon which department has jurisdiction.

What appellant is saying then is that, in formulating the clause here involved, the munitions board ille-

gally provided that the secretary of a military department might grant or withhold his consent to the sale, disposal, transfer, or alteration, of particular pieces of property covered by the clause. The contention is wholly unsound. The board has not, in formulating the clause, attempted to delegate to the secretary of any military department any of the specific statutory authority of the Secretary of Defense: (i) to determine what property should become part of the national industrial reserve; (ii) to formulate, vary, or modify a National Security Clause, (iii) to relinquish or waive the clause as such, or (iv) to designate what excess property should be disposed of subject to the clause (50 U.S.C.A. 453 (1), (2), (3), (4)). The most that it did was to authorize the secretary of the cognizant military department to consent to the removal, sale or disposal of particular pieces of property.

Precisely this distinction is drawn in the munitions board memorandum of 31 August 1949, referred to above (Appendix I). This designation was authorized by Section 111.303 of the regulations issued by the munitions board under the National Industrial Reserve Act of 1948 (14 FR 1492, 1 April 1949; 34 CFR 1-303), which provides that the munitions board may designate the secretary of any one of the military departments of the National Military Establishment (now the Department of Defense) to administer the provisions of the National Security Clause applicable to a particular industrial property in the National Industrial Reserve in the control of a transferee and may redelegate such authority as may be

required to enable such secretary to carry out such responsibility including, without limitation, authority to consent to alterations in the premises and *disposition or removal of production equipment* (Appendix II).

Such a delegation, if it is one, when made to an official at the secretarial level, is permissible under all the authorities. *Parish v. United States*, 100 U.S. 500 (1879); *Alvord v. United States*, 95 U.S. 356 (1877); *Norris v. United States*, 257 U.S. 77 (1921); *Robertson v. United States ex rel. Baff*, 285 Fed. 911 (App. D. C. 1922).

The *Cudahy* case (315 U.S. 357), cited by appellant, is not authority to the contrary. That case merely held that the power to issue subpoenas, conferred by statute upon the head of an executive department, bureau, or agency, could not be delegated to a subordinate official in the absence of an express grant of authority by Congress. There is a vast difference between the power to issue a subpoena, characterized by the Supreme Court as "a power capable of oppressive use," and the power to administer the provisions of the National Security Clause to the limited extent provided in the munitions board memorandum of 31 August 1949, and in the bill of sale involved herein.

Any remaining doubts on this score are removed by Section 202(f) of the National Security Act of 1947, as amended by the Act of 10 August 1949 (63 Stat. 591, 5 U.S.C.A. 171a(f)), which provides:

"The Secretary of Defense may, without being relieved of his responsibility therefor, and unless

prohibited by some specific provision of law, perform any function vested in him through or with the aid of such officials or organizational entities of the Department of Defense as he may designate.”

Appellant apparently would have the Secretary of Defense himself, or the full Munitions Board, men who are charged with multitudinous, complex, and difficult duties in these troublous times, take personal action on every single matter arising in the administration of the National Industrial Reserve. This would lead to administrative chaos. Fortunately, the law is not so blind as to require it.

Finally, appellant cannot be heard to object to this irregularity, if it is one. For by its own argument, if the designation of the Secretary of the Navy fails for want of legal basis, then only the Secretary of Defense or the Munitions Board itself could consent to the sales which Appellant was making and threatening to make. Appellant never obtained their consent, or indeed the consent of anyone. It is estopped now from raising its own wrong as a defense to its actions.

Failure to Replace Equipment.

By Finding VII, the Court below found that appellant had not replaced the tools and equipment which it had sold, and would not replace those it would sell in the absence of a restraining order (R. 95). Appellant alleges error in this finding, apparently on the ground that the national security clause had been removed from the machinery, tools and

equipment (App. Br. 8-9). This contention has been fully discussed above. The finding is amply supported by the evidence and should not be disturbed.

Essential Nature of Equipment.

By Finding VIII, the Court below found that the machine tools and equipment involved are essential and necessary if the capacity of the plant to produce the items for which it was designed is not to be materially reduced (R 95). This finding is amply supported by the record (R 345-349) and is apparently not challenged by appellant.

Irreparable Injury.

By Finding X, the Court below found that the United States had no plain, speedy, and adequate remedy at law, and would suffer irreparable injury unless appellant was enjoined from selling the personal property (R. 96). Appellant alleges error here, but on what basis is not very clear (App. Br. 9). It adverts to the Secretary of the Navy point, which is fully discussed above. What this has to do with the question of irreparable injury appellee cannot imagine. It also claims that an injunction does not lie for a threatened breach of contract (R. 89, 398).

It is perfectly clear, on the basis of the facts found in Findings III through IX, that appellant's acts and threatened acts would, if consummated, strip the Moore Drydock West Yard of its essential machinery, machine tools, and production equipment, and thus materially reduce its capacity as a shipbuilding and

ship-repair installation. It was precisely to preserve this capacity that the national security clause was placed on the equipment in the first place. An action at law and the recovery of monetary damages would not restore the capacity of the yard so as to make it available in time of emergency. Under such circumstances, the Government may of course obtain an injunction to enforce its laws and property rights.

United States v. San Francisco, 310 U.S. 16;

United States v. United Mine Workers, 330 U.S. 258;

In re Debs, 158 U.S. 564;

United States v. Louisiana, 339 U.S. 699;

United States v. Texas, 339 U.S. 707.

see, also:

Bitterman v. Louisville & Nashville Railroad,
207 U.S. 205 (1907).

It is equally clear that the Government's remedies under its contract were inadequate under the circumstances here presented. Appellant makes much of the Government's alleged failure to exhaust its administrative remedies (App. Br. 9, 26-29). Paragraph 6 of the bill of sale gives the Government a right to take full possession of the machinery, machine tools and equipment in the event of vendee's default (R. 11). The Government does not want full possession now. What good would it do if, the minute the Government stepped out, the appellant proceeded with its announced intention of stripping the plant? The Government has a contract right to insist that the capacity of the plant be maintained. In the face of

appellant's threatened conduct, only an injunction will meet this need.

Appellant seems to claim that this paragraph is no longer in effect. It reaches this strange result by the following route: Paragraphs 5 and 6 of the bill of sale are almost identical with Paragraphs 11 and 12 of the security clause in the original deed. The latter were superseded by Paragraphs 11 and 12 of the modified clause. *Ergo*, we need say no more about the bill of sale (App. Br. 26-27). At least this has the merit of consistency; it is altogether in line with appellant's approach throughout in its bland disregard of outstanding contractual provisions.

Appellant seems to claim that the default clause of the modified quit claim deed applies here. But how can this be if, under appellant's view, the modified deed has no application to the personal property? Again, appellant wants to carry water on both shoulders. The Government is seeking to enforce its rights in the *personal property*, conferred by the bill of sale. The modified deed has no bearing on this case.

Even if it did, its remedies would be wholly inadequate. It provides for notice of default in writing, 30 days for the grantee to submit evidence that it is not in default, then a further notice of default, plus a reasonable time for the grantee to cure the default, after which the Government can take possession and itself remedy the default. All this may be fair enough where the grantee is failing to maintain or protect the property. Where it is wantonly stripping it, it

is worse than useless: there would be nothing left by the time the Government took possession.

Under any view of the matter, the Court below was clearly correct in holding these remedies inadequate. They were designed primarily to give the Government the right of self-help in the event a grantee fell down on its maintenance obligations. They are obviously inapposite when a grantee is stripping a plant to the bone.

The Government did in fact notify appellant by telegram of the latter's violations and demanded that it desist (R. 41). When appellant replied that it had no intention of recognizing its obligations (R. 46), the government had no alternative but to request the Court below for an injunction.

POINT II.

THE DISTRICT COURT'S CONCLUSIONS OF LAW ARE IN ACCORD WITH THE APPLICABLE STATUTES AND HAVE BEEN CORRECTLY APPLIED TO THE FACTS OF THE CASE.

The Court below made three conclusions of law:

I. The machine tools and equipment are part of the "National Industrial Reserve" and are in the possession of the defendant subject to the "National Security Clause" within the meaning of the National Industrial Reserve Act of 1948.

II. Further sale and disposition of such machine tools and equipment will frustrate and subvert the public policy of the United States as embodied in

said Act and will cause irreparable damage to the plaintiff.

III. Plaintiff is, therefore, entitled to a preliminary injunction (R. 96-97).

These conclusions of law flow inevitably from the findings of fact made by the Court and require no extended discussion. Although appellant claims that they are in error (App. Br., 10) he assigns no new reasons other than reiterating his contentions that (a) the National Security Clause was removed from the personal property by the modified quit claim deed, and (b) the Secretary of the Navy has no legal authority to grant or withhold consent to any disposal of said property, either under the bill of sale or under the Court's injunction. These arguments have been fully considered above and there is no point in going into them further. They are wholly without merit.

Inapplicability of California Law to National Security Clause.

In its order denying appellant's motion to dismiss, the Court below held that the restrictions and covenants in the bill of sale were not void as unlawful restraints on alienation, but were authorized by the National Industrial Reserve Act, and the California law governing restraints on alienation did not control transfer of this property or the accompanying restrictions (R. 83-84). Appellant attacks this holding and claims that covenants against resale are void (unless an option to lease or reverter clause is in-

cluded in the instrument of transfer) in California, where the property is located (App. Br. 23-26).

The rule against restraints on alienation is a rule of common law which may be changed by statute. Congress has changed it in the National Industrial Reserve Act of 1948, by authorizing the formulation and use of a "National Security Clause". At the time this statute was enacted the National Security Clause was not a new thing. It had been worked out as a matter of contract and included in numerous sales of surplus property made at the end of the war. An early version of the clause was recommended as far back as August 22, 1946 by the Army and Navy Munitions Board, predecessor of the present Board, and a standard clause was approved for use by the Assistant Secretary of the Navy on October 19, 1946, and by the Under Secretary of War on October 21, 1946. All these early versions included restraints on alienation of the kind of which appellant complains. Prior to enactment of the National Industrial Reserve Act of 1948, Congress gave statutory recognition to such clauses in Section 5 of the Act of August 5, 1947 (P.L. 364, 80th Congress, 61 Stat. 774). The legislative history of both these statutes indicate that Congress had in mind a clause embodying the very type of provisions which were included in the bill of sale here involved.*

*House of Representatives, Committee on Armed Services, Subcommittee Hearings on H.R. 3471 (80th Cong., 1st Sess., No. 147), May 22, 1947, pp. 2363-2364.

Hearing before Senate Committee on Armed Services, 80th

The power of Congress to authorize restraints on alienation, applicable to land disposed of pursuant to federal statute, cannot be questioned. It has been affirmed by the United States Supreme Court not once but numerous times.

Heckman v. United States, 224 U.S. 413 (1912);

Bowling and Miami Investment Company v. United States, 233 U.S. 528 (1914);

United States v. Noble, 237 U.S. 79 (1915);

United States v. Reily, 290 U.S. 33 (1933).

In the *Heckman* case, the Supreme Court held that, where Congress had decided to place restrictions upon the right of alienation as an essential part of a plan of individual allotment of Indian lands, the United States had a national interest which could not be defeated by concepts of property law. The Court said:

“This national interest is not to be expressed in terms of property, or to be limited to the asser-

Cong., 1st Sess., on S. 1198 (H.R. 3471), July 19, 1947, pp. 4, 17-18.

H. Rep. No. 623, 80th Cong., 1st Sess. [to accompany H.R. 3471], June 20, 1947, pp. 1, 3.

House of Representatives, Committee on Armed Services, Subcommittee Hearings on H.R. 6098 (80th Cong., 2d Sess., No. 269), May 5, 1948, pp. 6742-3, 6745-6, 6771-2.

House of Representatives, Committee on Armed Services, Hearings on H.R. 6089 (80th Cong., 2d Sess., No. 271), May 18, 1948, pp. 6797, 6800-6801.

H. Rep. No. 1998, 80th Cong., 2d Sess. [to accompany H.R. 6098], May 20, 1948, pp. 3, 5.

Sen. Comm. on Armed Services, Hearings on S. 2554 (80th Cong., 2d Sess.), May 18 and 25, 1948, pp. 5, 26.

S. Rep. 1409, 80th Cong., 2d Sess., May 26, 1948, pp. 5, 8.

Congressional Record, June 1, 1948, p. 6959.

tion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." (224 U.S. 413, 437.)

And

"The authority to enforce restrictions of this character is the necessary complement of the power to impose them." (224 U.S. 413, 438.)

In the *Bowling* case, *supra*, the Supreme Court said:

"The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent." (233 U.S. 528, 535.)

Appellant's reliance on California law is misplaced, for the simple reason that California law cannot be allowed to defeat the national policy of the United States expressed in a Congressional statute. The United States Constitution makes the laws of the United States enacted pursuant thereto the "Supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Article VI, Clause 2.)

No disposal of federal property can be made except by authority of Congress, in whom the power has been vested by the Constitution. Article VI, Section 3, Clause 2 provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The property here

in question was federal property sold to appellant by General Services Administration pursuant to an Act of Congress, the Surplus Property Act of 1944 (Act of October 3, 1944, 58 Stat. 765, as amended, 50 App. U.S.C. 611 *et seq.*). The restraint on alienation here in question was imposed pursuant to another Act of Congress, the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225). These express provisions of United States law cannot be defeated by any State statute or rule of local law.

United States v. County of Allegheny, 322 U.S. 174 (1944);

United States v. Jones, 176 F. (2d) 278 (9th Cir., 1949).

In the *Allegheny County* case, the Supreme Court said:

“Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.

“Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government’s general authority were subject to

local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. * * * Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts.” (322 U.S. 174, at 182.)

In the *Jones* case, this Court said:

“This is a case in which the Government, in its sovereign capacity, deals with property which it owns. Its contracts relating to such property stem from ownership, and the manner of its sale is governed by specific federal statute. There is, therefore, no room for the application of any local law merely because the sale took place in Oregon, was made to a citizen of Oregon by government agents resident in Oregon.” (176 F. (2d) 278, at 281.)

In enacting the National Industrial Reserve Act, Congress was not only exercising its constitutional power over the disposal of Government property, it was exercising power of even greater importance, its power and duty to provide for the common defense, to raise and support armies, and to provide and maintain a Navy (*U. S. Constitution*, Art. I, Sec. 8). In Section 2 of the Act, it announced its intention “to provide a comprehensive and continuous program for the future safety of the United States by pro-

viding adequate measures whereby an essential nucleus of Government-owned industrial plants and a national reserve of machine tools and industrial manufacturing equipment may be assured for immediate use to supply the needs of the armed forces in time of national emergency or in anticipation thereof." The high policy of the United States, thus announced by Congress, is not to be defeated by technical rules of local law.

- Detroit Bank v. United States*, 317 U.S. 327;
Michigan v. United States, 317 U.S. 338;
Clearfield Trust Co. v. United States, 318 U.S. 363;
National Metropolitan Bank v. United States, 323 U.S. 454;
D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U.S. 447;
In re Read-York, 152 F. (2d) 313 (C.C.A., 7);
Girard Trust Co. v. United States, 149 F. (2d) 872, 161 F. (2d) 159 (C.C.A., 3);
Woodward v. United States, 167 F. (2d) 774 (C.C.A., 8);
United States v. Board of Com'rs. of Freemont County, Wyo., 145 F. (2d) 329 (C.C.A., 10);
Mayo v. United States, 319 U.S. 441;
United States v. Summerlin, 310 U.S. 414;
Estate of Lindquist, 25 C. (2d) 697, 154 P. (2d) 879;
United States v. Standard Oil Co., 332 U.S. 301;
Arizona v. California, 283 U.S. 423, 451;

Ohio v. Thomas, 173 U.S. 276;

Hunt v. United States, 278 U.S. 96;

Johnson v. Maryland, 254 U.S. 51.

The cases cited by appellant on this point have no application. The *Dr. Miles Medical* case, 220 U.S. 373 (1911) merely announced the common law rule on restraints against alienation. It did not involve federal property, nor did it involve the exercise of a constitutional power, or a statute modifying the common law. *Thompson v. Magnolia Petroleum Company*, 309 U.S. 478 (1940) merely holds that in a bankruptcy proceeding, the question of title to real property is determined by local law. This is horn-book law, but it has no application to a contract whereby property is disposed of by the Government pursuant to an act of Congress in the exercise of its constitutional powers.

The State Courts in California have themselves held that, even in matters involving real property located wholly within the State, the rules of California law must yield to the supreme law of the land under Article VI, Section 2, of the United States Constitution. *Fujii v. California* (Cal. District Court of Appeal, Second. App. Dist., Div. 2, Civil No. 13,309, 1950).

It is clear that the Court below was right in ruling that the restrictions and covenants here involved are valid and enforceable in accordance with their terms, and that California law has no bearing on their legality.

POINT III.

THE REMAINING ARGUMENTS ADVANCED BY THE APPELLANT ARE WHOLLY WITHOUT MERIT.

Appellant has made a number of other arguments, which the Court below apparently did not even see fit to discuss. Only a few of them need attention here.

Standing of Government to Maintain Suit.

Appellant seems to claim that his appeal presents the question whether the Government can maintain a suit involving a contract made under the National Industrial Reserve Act, without alleging and proving that the suit was authorized by the Secretary of Defense (App. Br. 6; R. 398). This claim is hardly worth discussing. The complaint was filed on behalf of the United States of America by the United States attorney for the Northern District of California. The authority of the United States attorney to conduct any kind of legal proceeding involving the interests of the United States cannot be seriously contested in this Court.

Act of June 30, 1906, 34 Stat. 816, 5 U.S.C. 310;
United States v. Thompson, 251 U.S. 407
(1920);

United States v. Hall, 145 F. (2d) 781 (C.C.A.
9th 1944).

See, also:

United States v. Louisiana, 339 U.S. 699;
United States v. Texas, 339 U.S. 707.

There is no question under these authorities but that the Attorney General had full power to direct the

bringing of this suit, regardless of how he got his information, whether from the Secretary of Defense, the Munitions Board, the Navy Department, or even a private citizen.

Releases by General Services Administration.

Appellant claims that, because the General Services Administration gave releases covering certain items of machine tools and equipment here involved, appellant was free to sell the same (App. Br. 7, 9, 11-12, 29-31).

This is not so. The real and personal property were sold for a total amount of \$1,201,500, of which appellant paid \$240,300 in cash, giving its note for the balance of \$961,200. This note was secured by a trust deed on the real property and a chattel mortgage on the personal property (R. 66-73). The chattel mortgage, which was made to War Assets Administration, acting for and on behalf of the United States as mortgagee, recited that the sum of \$366,660 had been established as the fair value of the chattels, and that the mortgagee agreed to release the chattels *from the lien of the chattel mortgage* upon payment of this amount. It further provided that the mortgagee would release a part of the said chattels upon the payment by the mortgagor to the mortgagee of the fair value, established by the mortgagee, of the property to be released (R. 68-69).

Upon payment by appellant of various installments against the purchase price, General Services Administration, the statutory successor to War Assets Administration, delivered to appellant some seven

releases from the chattel mortgage covering specific items of machine tools and equipment (R. 46). These releases *by their terms* released and discharged "*from the lien of the chattel mortgage*" the portions of personal property therein described. They did not purport to do any more. They could not have released the property from the National Security Clause, for the obvious reason the bill of sale recited that only the Secretary of the military department having jurisdiction could do so. On this point appellant is trapped by its own argument. It claims throughout that only the Secretary of Defense and the Munitions Board have any authority over the National Industrial Reserve. Yet here we find it arguing that a release executed by a subordinate official of General Services Administration, who has been given no authority by statute, contract, or otherwise to grant releases from the National Security Clause, has done just that by executing a release from a chattel mortgage.

We ask the Court to consider for a moment the unreasonableness of appellant's position. If appellant had paid the full purchase price in cash there would have been no occasion for it to give any deed of trust or chattel mortgage. Nevertheless the restrictions of the National Security Clause would have been imposed. Now it claims that, because it bought the property on the installment plan, its rights are somehow greater and that, as it paid off the installments, it was automatically released from the restrictions of the National Security Clause. Merely to state this proposition is to demonstrate how untenable it is.

Appellant refers to Paragraph 9 of the letter of intent (Plaintiff's Exhibit 1; App. Br. Appendix B), which stated that, in the event the restrictions of the National Security Clause were removed from the personal property, the Government would release the personal property from the lien of the chattel mortgage upon payment of the total amount due. Even if this paragraph were controlling, it would not follow that a release from the chattel mortgage given by the Government *before* the restrictions of the National Security Clause were removed would effect an automatic removal of such restrictions. But this paragraph is inapplicable. The letter of intent was superseded on June 1, 1949 by the formal bill of sale and by the chattel mortgage. The provisions of the chattel mortgage, quoted above, do not include any reference to the National Security Clause. That was in the bill of sale.

Appellant also points to paragraph 9 of the chattel mortgage (R. 27), in which the mortgagor warranted that there were no liens, encumbrances or adverse claims of any kind against the property. This is a standard provision found in any form of chattel mortgage. It protected the Government against the existence of liens or the property in the hands of third persons. The National Security Clause as defined by statute, is a "series of conditions, restrictions, and reservations". It is not a "lien", as that term is ordinarily used in the field of creditor's rights. A lien, in the sense in which the term was used in the chattel mortgage, is a charge on property to secure

payment of a debt. *Empire Trust Company v. Egypt Railway Co.*, 182 Fed. 100 (1910, N. Carolina Cir. Ct.)

Appellant cites Section 203 of the Federal Property and Administrative Services Act of 1949 (Public Law 152, 81st Congress, 63 Stat. 377, 41 U.S.C.A. 233), and seems to argue that it has some bearing on this point. A mere reading of this section, and particularly subsection (d) thereof (App. Br. Appendix C, page 13), shows that it cannot possibly be construed as providing that a partial release from a chattel mortgage is a release from a National Security Clause imposed by a separate instrument, especially where no contention is made that the rights of any bona fide grantee or transferee for value and without notice are involved.

CONCLUSION.

The order denying appellant's motion to dismiss the complaint and granting a temporary injunction is correct in all respects and should be affirmed.

Dated, San Francisco, California,
January 29, 1951.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

ROBERT F. PECKHAM,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendices I and II Follow.)

Appendix I

Refer to:

MB PRP 004

MUNITIONS BOARD
WASHINGTON 25, D. C.

31 August 1949

MEMORANDUM FOR THE ASSISTANT SECRETARIES OF THE NAVY

SUBJECT: Delegation of Responsibility for Administering the Provisions of the National Security Clause, with respect to Facilities in the National Industrial Reserve.

1. Pursuant to the authority delegated to the Munitions Board by the Secretary of Defense on 3 July 1948 (13 F.R. 4576) and in accordance with the provisions of paragraph 1-203 of the Code of Federal Regulations Title XXXIV—National Military Establishment, the Secretary of the Navy is delegated the authority to administer the provisions of the National Security Clause applicable to a particular excess industrial property of the National Industrial Reserve under the control of his department, with power to redelegate such authority as may be required to enable the Secretary to carry out his responsibilities. This delegation of authority will include the power to
 - (a) Negotiate contracts to utilize the productive capacity of a facility for national defense

purposes, in accordance with the terms of the National Security Clause applicable to a property and as may be provided by allocation procedure under Annex 47 of the Industrial Mobilization Plan.

- (b) Consent to alterations in the premises, in accordance with the terms of the National Security Clause applicable to the property.
- (c) Consent to the removal, sale or disposal of any of the machine tools or other severable production equipment in accordance with the terms of the National Security Clause applicable to the property.

2. For the purposes of this delegation of authority, the plants which shall be deemed to be under the control of the Secretary of the Navy are listed in Inclosure No. 1 hereto. Modifications in this list will be made only with the specific approval of the Chairman of the Munitions Board.

3. Nothing herein shall be construed to authorize the Secretary of the Navy to modify or waive the provisions of the National Security Clause therein, except by the terms of the National Security Clause applicable thereto.

4. The Secretary of the Navy will advise the munitions Board of each action taken under this delegation of authority.

For the Munitions Board

Signed

Harry E. Blythe

Chief

Office of Production Planning

Incl: List of Plants

dtd 15 July 1949

15 July 1949

LIST OF PLANTS DEEMED TO BE UNDER THE
CONTROL OF THE SECRETARY OF THE NAVY FOR
ADMINISTRATION OF THE PROVISIONS OF THE
NATIONAL SECURITY CLAUSE

| | | | | | | |
|-------------------|---------------------|----------|---|---|---|---|
| * | * | * | * | * | * | * |
| Moore Drydock Co. | Oakland, California | MC-70588 | | | | |
| * | * | * | * | * | * | * |

Appendix II

34 CFR 1.0303

(32 CFR, 1949 Supp., Subtitle A, Sec. 111.303)

“§111.303 *Redelegation to Secretaries of military departments.* The Munitions Board may, under the authority delegated to it by the Secretary of Defense, designate the Secretary of any one of the military departments of the National Military Establishment to administer the provisions of the National Security Clause applicable to a particular excess industrial property in the National Industrial Reserve in the control of a transferee and may redelegate such authority as may be required to enable such Secretary to carry out such responsibility including, without limitation, authority to consent to alterations in the premises and disposition or removal of production equipment: *Provided however,* That the provisions of the National Security Clause applicable to the property shall not be modified or waived, nor shall any dormant estate be activated or terminated (other than by its own terms) except pursuant to a determination by the Munitions Board.”

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12653

OAKLAND DOCK AND WAREHOUSE COMPANY,
a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

WM H. NEBLETT,
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Oakland, California,
Attorney for Appellant.

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 12653

OAKLAND DOCK AND WAREHOUSE COMPANY,
a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENTS *

No statement of fact made in appellant's brief is controverted by the appellee. Thus the correctness of appellant's STATEMENT OF THE CASE is conceded (Par. 3, Rule 20 of This Court).

Appellee's brief presents the single question: Whether or not the District Court *had jurisdiction* to grant the temporary injunction on the terms and conditions of the bill of sale without considering its reference to the quit-claim deed and its subsequent modification?

The question of whether or not the District Court *has*

* Italics ours unless otherwise specified.

jurisdiction to grant an injunction in a proper case was not raised by the appellant in the court below or specified as error in its brief. The record shows that this is not a proper case for an injunction. For these reasons the numerous cases cited by appellee in answer to its question of jurisdiction will not be digested by appellant. Those cases have no bearing on the questions presented by the record. Sensing the inapplicability to the record of the cases it cites appellee goes outside of the record for all of the evidence used in support of its argument. Appellee's brief violates Rule 20 of This Court and comes within the procedure required by Subdivision 7 of the Rule.

THE QUESTION OF JURISDICTION AS PRESENTED BY APPELLEE IS OUTSIDE THE RECORD

The bill of sale (R. 7) standing alone *does not*, as appellee contends, contain *any terms or conditions preserving the machinery, machine tools, and equipment for national defense uses* (Point II, pp. 19-26, Appellant's Brief). A national security clause is *made applicable to the machinery, machine tools, and equipment by reference in paragraphs 1 and 2 of the bill of sale* (R. 9) to the security clause in the quit claim deed (R. 59-65). This reference makes the bill of sale and the quit claim deed, together with its subsequent modification, one instrument, and they must be so construed.

L. A. & Salt Lake Ry. Co. v. United States, Ct. of App. 9th Cir., 140 Fed. 2d 436

The *modification of the security clause* (R. 73), dated February 28, 1950, *released the security clause from the appellant's machinery, machine tools and equipment* (Point II, p. 19, Appellant's Brief). The Letter of Intent (Government's Exhibit No. 1, pages 8-10 of Appendix B to Appellant's Brief), the Bill of Sale (R. 7), the original Quit Claim Deed (R. 52), the Chattel Mortgage (R. 66), and the Modifications of the Covenants and conditions of the Quit Claim Deed (R. 73) *were all discretionary administrative*

determinations made by the Munitions Board under the authority granted to it by the Secretary of Defense.

National Security Act, 5 USCA, Sections 171, 171(a)-171(h);

National Industrial Reserve Act of 1948, 50 USCA, Sections 451-462.

The administrative determination of the Munitions Board to modify this national security clause was made under the powers granted by these Acts of Congress to the Secretary of Defense and by him delegated to the Munitions Board. The clause was modified, February 28, 1950, on application of the appellant, made pursuant to paragraph 3 of the original quit claim deed (R. 59), which paragraph is as follows:

“3. *The grantee, or the Secretary (as hereinafter defined), may at any time cause a re-examination of the necessity for continuing the dormant estate upon the plant or any portion thereof. Such estate may be discontinued at any time during the twenty-year period when the Secretary determines such action consistent with the national defense interests of the United States.*”

These administrative determinations made by the Munitions Board under the direction of the Secretary of Defense *will not be interfered with by the courts. An officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of judgment and discretion which the law reposes in him as a part of his official functions. This doctrine is applicable to the writ of injunction.*

Gaines v. Thompson, the Secretary of the Interior, 74 U. S. 347; 19 L. Ed. 62.

The courts have no power to control the exercise by an officer of a discretion vested in him by Congressional act.

Hubert Work, Secretary of the Interior, 267 U. S. 175, 69 L. Ed. 561.

The District Court *was without power to attempt the administration by injunction on other process* the national security clause contained in the papers of this case. Thus the lower court *had no power to find or conclude that the modified security clause did not remove the clause from appellant's machinery, machine tools, and equipment*. The applicable statutes confide *the right of that determination solely in the Secretary of Defense and his delegate, the Munitions Board*. As far as the record goes the Secretary and the Board appear to be *satisfied with the modified clause and intend to abide by it*. The Navy Department's action appears from the record to be *pure insubordination to its superiors* and expresses an *unwillingness to accept the Congressional direction contained in The Unification Act (National Security Act as amended, 5 USCA, Section 171 et seq.)*. In the circumstances, the temporary injunction destroys the one purpose of the *Unification Act* and the *National Industrial Reserve Act of 1948*. These questions have all been settled in favor of appellant's contentions by the recent decision of This Court in *Monolith Portland M. Co. v. RFC*, 178 Fed. 2d 854, and the other cases to the same point, cited by appellant at page 29 of its brief. There being no possible answer to the doctrine of these cases appellee follows the normal bureaucratic procedure of ignoring them.

Pursuant to the administrative determination so made appellant went ahead and sold some of its machinery, machine tools, and equipment, paid the Government the release prices fixed in accord with these administrative decisions and obtained releases from General Services Administration in the circumstances detailed in Point IV, pp. 29-31 of Appellant's Brief. Neither *the Secretary of Defense nor his delegate, the Munitions Board*, has made any objection to the sales made by appellant. The *Navy Department*, which has never *had any statutory or delegated authority* here, is the sole objector (Point I, p. 12, Appellant's Brief).

Appellee (Appellee's Brief, pp. 15-21), realizing that the temporary injunction is void on the face of the record,

goes outside the record for support of the order granting the injunction and brings in for the first time (Appellee's Brief, Appendices I and II) *a purported delegation of authority* from the Munitions Board to the Navy Department to administer the security clause here involved. The *purported delegation was not* shown to counsel or *offered in evidence* at the hearing on the order to show cause for a temporary injunction. Therefore, appellant believes that This Court will disregard it. However, to demonstrate how loosely and carelessly some of our bureaucratic officials handle the business of the public, appellant is constrained to remark that, if the document had been offered at the hearing it would have been rejected by the lower court for these reasons: (1) The Munitions Board *had no power to redelegate the authority which the Secretary of Defense had delegated to it*; (2) The Secretary of Defense *could not and did not authorize the Board to make a re-delegation to the Navy Department*; (3) The purported delegation *was not approved by the Board*; (4) The Board *did not and could not authorize one Harry E. Blythe, who signed it, to make this, or any other decision for the Board*; (5) finally, and most important of all is that both the Navy Department and its Secretary are official strangers to the Board. A delegation of authority *can only be made to a subordinate*. It is doubtful if the Navy would concede that it is a subordinate of the Munitions Board. The *purported delegation* seems to be *an attempt to hold on to some part of the authority which was taken away from the Navy by the Unification Act*.

The temporary injunction giving the Secretary of the Navy *the authority to waive the national security clause by permitting the sale of machinery, machine tools and equipment* would, in light of this purported delegation, be void on the face of the record, even though the subsequent modification of the security clause had not been made. Appendices I & II to appellee's brief were promulgated August 31, 1949. The original bill of sale and quit claim deed were made June 1, 1949; the modification of the security clause, February 28, 1950. This suit was filed June

8, 1950. The reason why the purported delegation was not shown at the trial is obvious. If the Government had called it to the attention of the District Court at the hearing on the temporary injunction, the finding that *the Secretary of the Navy had jurisdiction to modify the clause* would probably not have been made.

APPELLEE'S BRIEF DOES NOT CONFORM TO RULE 20 OF THIS COURT. THE BRIEF SHOULD BE STRICKEN BECAUSE IT IS ABUSIVE, FRIVOLOUS AND MERE SHAM.

Appellee seems to contend that the Secretary of the Navy has full authority over appellant's property because the complaint, filed by the Attorney General on behalf of the United States, alleges that theory as the basis for a cause of action against appellant. The Attorney General is not sacrosanct. Of course, the Attorney General may file a suit for his client; he is counsel for the United States. In filing suits for it he has made his proportion of errors. The motives of the Attorney General, in the prosecution of a suit or other proceedings for the United States against a citizen, may be questioned in the courts.

Bridges v. United States (Ct. of App. 9th Cir.), 184 Fed. 2d 881;

U. S. v. Coplon (Ct. of App. 2nd Cir.), 185 Fed. 2d 854.

The Bridges and Coplon cases, and the tone of appellee's brief demonstrate that the Attorney General's Office has not been free from the hysteria which has of late controlled the actions of some of the government departments and their bureaus. In recent times the mere mention of national defense in connection with a governmental function leads officers, charged with the administration of law, to discard reason and discretion in order to prove their zeal to persecute all those who dare to disagree with them. This attitude of our administrative officers helps to explain the frivolous and sham character of appellee's brief,

set on a professional level far below that of the dignity which should mark presentations to This Court by members of its bar.

The bitter argument of appellee is designed to conceal from This Court *the purpose* of the Navy Department *to avoid performance by the Government of a valid contract, made between it and a citizen at the direction of the Department of Defense*, in which the Navy Department is a *subordinate unit* (Testimony of Admiral Klein, R. 252).

National Security Act, as amended, 5 USCA, Sections 171 *et seq.*

We have already shown how the appellee based about half its argument upon Appendix I of its brief, which document is not the record. We now show how the remaining part of the argument is likewise based upon matter which is not a part of the record. Knowing that the record shows that *the modified security clause of February 28, 1950, removed the clause from appellant's machinery, machine tools, and equipment*, the appellee again *goes outside* the record for evidence *it proposes to offer, if this case ever goes to trial*. The whole argument to offset the modification of the security clause of February 28, 1950, is based upon the following offer of proof, admittedly not a part of the record, which the appellee proposes to produce at the time of trial. The offer is made at pages 7 and 8 of Appellee's Brief and is as follows:

"There is no *evidence* in the record bearing on the intent of the parties in executing the February 28, 1950, modification. Appellant believes that the whole question of the modification of the deed is irrelevant, because the case turns on the provisions of the bill of sale. But if, at the trial on the permanent injunction, appellant succeeds in bringing up this point, the Government is prepared to show, by competent evidence, that the changes of which appellant makes so much, were in fact made upon the request of counsel for the appellant and solely upon his representation that he wished to avoid any duplication and overlapping between the two instruments, and desired to be put in a

better position subsequently to request removal of the restrictions contained in the bill of sale without having to request a second modification of the deed. The Government can further prove that this was the *sole* ground for the change, and that this fact was brought home both to appellant's president and to its counsel. For appellant now to argue that these changes made under these circumstances, amounted to a surrender by the Government of its rights, approaches chicanery."

The entire quoted statement is *false* and appears to have been *deliberately so made*. There is evidence in the record establishing *the intent of the parties* executing the modified security clause (Government's Exhibit No. 1, p. 8, Appendix B, Appellant's Brief). The Letter of Intent is digested on pages 3 and 4 of appellant's brief and its legal effect is presented between pages 29-31. The unsupported charges of fraud and chicanery leveled by appellee at the appellant's president and its counsel—Welburn Mayock and Wm. H. Neblett, members of the Bar of This Court, and A. L. Wheeler of the District of Columbia Bar (R. 241), may move This Court to strike appellee's brief.

The offense is much aggravated because the offered testimony is wholly false. There is no such evidence, and whoever persuaded the appellee to include the offer of it in the brief is guilty of an attempted deception of This Court. It is surprising that appellee allowed such an offer to go into its brief, not only because of its false character, but also because the proposed evidence would be inadmissible. Appellee must know that *oral evidence is inadmissible* to establish *the intention of the parties* to the written modified security clause, even though *one of the parties is the United States*.

Los Angeles & Salt Lake Ry. Co. v. United States,
(Ct. of App. 9th Cir.) 140 Fed. 2d 436, 438.

That case not only settles in appellant's favor the point to which it was just cited; it also settles, in favor of appellant's contention, that the national security clause here involved will be construed by This Court in accord with California law. This Court said:

“Since the *land* they describe is situated in California, interpretation of the deeds is governed by California law (citing and quoting sections 1636, 1639, 1641 of the California Civil Code). * * *

“Section 1066 of the California Civil Code provides that, with certain inapplicable exceptions, grants are to be interpreted in like manner with contracts in general. * * *

“The intention of the parties to the deeds here involved can, and therefore must, be ascertained from the deeds alone. It is reasonably practicable to give effect to every part of each deed. Therefore, in ascertaining the intention of the parties, the whole of each deed must be taken together.”

What now becomes of the contention of appellee, that *the bill of sale stands alone and cannot be construed with the original quit claim deed or its later modification?* The question is answered in the last sentence of the foregoing quotation. The letter of intent, the bill of sale, the original quit claim deed and its subsequent modification are all *parts of the same transaction* and they *must be construed together*.

Appellant contends that because appellee has violated, as heretofore shown, Rule 20 of this Court, and because its brief is sham and frivolous, and because it makes charges of fraud and chicanery against the president and counsel for the appellant, *its brief should be stricken, or, at least, the penalties of paragraph 7 of Rule 20 of this Court should be imposed upon appellee*.

The order granting the temporary injunction should be reversed.

Respectfully submitted,

WM H. NEBLETT,
615 Latham Square Bldg.,
Oakland, California,
Attorney for Appellant.

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

KENNETH A. LOWDEN,
Appellant.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court
for the District of Oregon.

HENRY L. HESS,
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United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

KENNETH A. LOWDEN,
Appellant.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court
for the District of Oregon.

ISSUES INVOLVED

1. Is the rule of statutory construction of ejusdem generis applicable to Section 495, Title 18, U.S.C.A.
2. Must instant indictment set out one of those instruments specifically enumerated in the statute creating the offense charged to state facts sufficient to constitute a crime.

APPELLEE'S ANSWER TO ISSUES INVOLVED

ISSUE NO. I

The doctrine of statutory construction of ejusdem generis is not applicable to Title 18, Section 495, U.S. C.A.

Prussian v. United States, 282 U.S. 675, 51 S. Ct. 223 and 75 L. Ed. 610.

Pina v. United States (C.C.A. 9th, 1948), 165 F. 2d 890.

Head v. Hunter (C.C.A. 10th, 1944), 141 F. 2d 449.

Johnson v. Warden (C.C.A. 9th, 1943), 134 F. 2d 166.

Goldsmith v. United States (C.C.A. 2d, 1930), 42 F. 2d 133.

United States v. Raskin (D.C.N.Y., 1943), 52 Fed. Supp. 343.

United States v. Mullin (D.C.Mo., 1943), 51 Fed. Supp. 785.

Argument

Appellant contends the doctrine of statutory construction of ejusdem generis is applicable to Section 495, Title 18, U.S.C.A. In support of this position appellant calls to the attention of the Court:

United States v. Dressler, 112 F. 2d 972.

United States v. Parker, 103 F. 2d 857.

United States v. Gooch, 297 U.S. 124.

Each of these cases considers the applicability of the ejusdem generis doctrine to the federal statute commonly known as the "Lindbergh Act," Section 1201, Title 18, U.S.C.A. For that reason appellant's cases are not in point. But even so, appellant's cases find the Courts refusing to apply the ejusdem generis doctrine to the kidnapping statute. The discussion by the Court of the ejusdem generis doctrine is especially interesting in *United States v. Gooch*, 297 U.S. 124, p. 128:

"The rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view."

In support of a negative answer to Issue No. I, appellee believes *Prussian v. United States* is most persuasive. That case involved the forerunner of the very statute under consideration and decided the very point in issue with the following language, 282 U.S. 675, at p. 679:

"But we think the indictment is to be sustained as charging an offense under Sec. 29 of the Criminal Code, which punishes the forgery of 'any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving . . . from the United States, or any of their officers or agents, any sum of money.' The indictment alleges specifically and with certainty the forgery of the endorsement on the draft, for the

purpose of obtaining a sum of money from the Treasurer of the United States, and charges a violation of § 29. We think the endorsement was a 'writing' within that section. Its language is 'comprehensive' and 'all-embracing.' Cf. *United States v. Davis*, 231 U.S. 183, 188. The writings enumerated have no common characteristic from which a purpose may be inferred to restrict the statute to any particular class of writings. The addition of 'other writing' to the enumeration was therefore not for the purpose of including writings of a limited class, but rather of extending the penal provisions of the statute to all writings of every class if forged for the purpose of obtaining money from an officer of the United States. See *Howgate v. United States*, 7 App. D.C. 217, 232, 233; cf. *United States v. Lawrence*, 13 Blatch. 211."

A companion statute, Section 494, Title 18, U.S.C.A., to the statute upon which the indictment in this appeal is founded has been the subject of several adjudicated cases wherein the applicability of the doctrine of ejusdem generis appeared.

Section 494 of Title 18, U.S.C.A., *supra*, protects against forgeries of any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit or other writing.

In *Pina v. United States* (C.C.A. 9th, 1948), 165 F. 2d 890, p. 894, this Court held that Sections 72 and 73 of Title 18, U.S.C.A., 1940 ed., the forerunners of Sections 494 and 495, were companion statutes and "identical canons of construction, therefore, can properly be applied to both." Therefore, it would appear that adjudicated cases discussing the applicability of the ejusdem generis doctrine to Section 72 (Section 494, Title

18, U.S.C.A.), supra, are proper authorities in support of appellee's position.

Those cases hold the words "or other writing" to include any written instrument used to defraud the United States. "The legislative preoccupation was with a result, rather than with the means by which it might be accomplished."

United States v. Raskin (D.C.N.Y., 1943), 52 Fed. Supp. 343.

Head v. Hunter (C.C.A. 10th, 1944), 141 F. 2d 449.

Johnson v. Warden (C.C.A. 9th, 1943), 134 F. 2d 166.

Goldsmith v. United States (C.C.A. 2d, 1930), 42 F. 2d 133.

United States v. Mullin (D.C.Mo., 1943), 51 Fed. Supp. 785.

In several of these cases, *Prussian v. United States* is cited with approval indicating that the interpretation placed upon the statute by the Court in the Prussian case is being followed generally.

Appellant urges that under the rule of ejusdem generis, Exhibit No. 1 cannot be included within the words of Section 495, Title 18, U.S.C.A., as "other writing." Section 495, supra, refers to any "deed, power of attorney, order, certificate, receipt, contract or other writing." These writings referred to fall in different categories of different meaning and unrelated in subject matter. The obvious and apparent purpose of Congress in enacting Section 495, supra, and its predecessors, was to protect against the forging, altering, counterfeiting or

false making of any writing for the purpose of obtaining money directly or indirectly from the United States, and consistent with that purpose Congress made use of the words "or other writing" to denote the comprehensive scope of the legislation.

ISSUE NO. II

The indictment need not set out the specifically enumerated writings included in Section 495, Title 18, U.S.C.A., to state facts sufficient to constitute a crime.

Prussian v. United States, 282 U.S. 675, 51 S. Ct. 223 and 75 L. Ed. 610.

Pina v. United States (C.C.A. 9th, 1948), 165 F. 2d 890.

Head v. Hunter (C.C.A. 10th, 1944), 141 F. 2d 449.

Johnson v. Warden (C.C.A. 9th, 1943), 134 F. 2d 166.

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United States v. Mullin (D.C.Mo., 1943), 51 Fed. Supp. 785.

Argument

Appellant's contention that the indictment does not state sufficient facts to constitute a criminal violation of Section 495, Title 18, U.S.C.A., is premised on the supposition that this section is susceptible to the application of the doctrine of ejusdem generis (Appellant's Brief,

p. 14). Appellee, however, believes that appellant's supposition is incorrect, the incorrectness of which is presented in appellee's brief of Issue No. I.

The indictment charges the defendant "did alter, forge and counterfeit a certain writing, to-wit:" It is clear if the ejusdem generis doctrine is not applicable to Section 495, *supra*, all elements of an offense under that statute are charged and the specifically enumerated writings need not be alleged.

CONCLUSION

All rules of statutory construction are subordinated to the doctrine that Courts will construe the Act to conform with the dominating general purpose and legislative intention. The general purpose and intention of Congress in enacting the statute involved in this appeal was to protect against *any* writing if altered or forged for the purpose of obtaining or receiving money from the United States. Giving effect to this legislative purpose and intention, appellant's attack of the indictment is untenable and the judgment appealed from must be affirmed.

Respectfully submitted,

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